No. 97-569-CFX Title: Burlington Industries, Inc., Petitioner
v.
Kimberly B. Ellerth

Docketed: October 1, 1997 Court: United States Court of Appeals for the Seventh Circuit

Entry	Date	Proceedings and Orders
	Sep 29 1997	Petition for writ of certiorari filed. (Response due November 30, 1997)
	Oct 20 1997	Order extending time to file response to petition until November 30, 1997.
	Dec 1 1997	Motion of Chamber of Commerce of the United States of America for leave to file a brief as amicus curiae filed.
	Dec 1 1997	Brief of respondent Kimberly Ellerth in opposition filed.
	Dec 12 1997	Reply brief of petitioner Burlington Industries, Inc. filed.
	Dec 30 1997	DISTRIBUTED. January 16, 1998
	Jan 20 1998	REDISTRIBUTED. January 23, 1998
	Jan 23 1998	Petition GRANTED. limited to Question 1 presented by the petition. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, March 4, 1998. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, March 30, 1998. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, April 14, 1998. Rule 29.2 does not apply. SET FOR ARGUMENT April 22, 1998. **********
	Jan 23 1998	Motion of Chamber of Commerce of the United States of America for leave to file a brief as amicus curiae GRANTED.
	Feb 4 1998	Motion of Ernest T. Rossiello, Esquire, to permit Elena M. Dimo-Poulos, Esq. to present oral argument pro hac vice filed.
	Feb 23 1998	Motion of Ernest T. Rossiello, Esquire, to permit Elena M. Dimo-Poulos, Esq. to present oral argument pro hac vice DENIED.
	Mar 3 1998	Joint appendix filed.
	Mar 3 1998	Brief of petitioner Burlington Industries, Inc. filed.
	Mar 4 1998	Brief amicus curiae of Equal Employment Advisory Council filed.
	Mar 4 1998	Brief amicus curiae of Chamber of Commerce of the United States of America filed.
	Mar 16 1998	CIRCULATED.
	Mar 30 1998	Brief of respondent Kimberly Ellerth filed.
	Mar 30 1998	Brief amicus curiae of National Employment Lawyers Association filed.
	Mar 30 1998	Brief amicus curiae of American Federation of Labor and Congress of Industrial Orgs filed.
	Mar 30 1998	Brief amici curiae of Equal Rights Advocates, et al. filed.
	Mar 30 1998	Brief amici curiae of United States and Equal Employment Opportunity Commmission filed.

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No. 97-569-CFX

Entry	Date	Proceedings and Orders
	Mar 30 1998	Brief amicus curiae of Rutherford Institute filed.
	Apr 2 1998	Record filed.
	Apr 2 1998	Motion of Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Apr 13 1998	Reply brief of petitioner Burlington Industries, Inc. filed.
	Apr 20 1998	Motion of Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Apr 22 1998	ARGUED.

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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

BURLINGTON INDUSTRIES, INC.,
Petitioner,

v.

KIMBERLY B. ELLERTH,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a claim of *quid pro quo* sexual harassment may be stated under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, et seq., where the plaintiff employee has neither submitted to the sexual advances of the alleged harasser nor suffered any tangible effects on the compensation, terms, conditions or privileges of employment as a consequence of a refusal to submit to those advances?

2. Whether strict liability is the proper standard of liability under Title VII for *quid pro quo* sexual harassment?

LIST OF PARTIES

The proceeding in the United States Court of Appeals for the Seventh Circuit, whose judgment is sought to be reviewed, consisted of two proceedings, Nos. 95-3128 and 96-1361, which were consolidated by the Court of Appeals for purposes of decision.

The following persons and entities are now before the Court and were parties to the proceedings indicated:

Petitioner: Burlington Industries, Inc.* (No. 96-1361)

Respondent: Kimberly B. Ellerth (No. 96-1361)

The following persons and entities were parties to the proceedings indicated:

Alice Jansen (No. 95-3128); Packaging Corporation of America (No. 95-3128)

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* Pursuant to Supreme Court Rule 29.1, Petitioner Burlington Industries, Inc. states that it has no parent or subsidiary corporations, other than wholly-owned subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Burlington Industries, Inc. respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The en banc opinion of the court of appeals (App., *infra*, 1a-208a) is reported at 1997WL 459001. The panel opinion of the court of appeals (App., *infra*, 209a-241a) is reported at 102 F.3d 848. The opinion of the district court (App., *infra*, 241a-287a) is reported at 912 F. Supp. 1101.

JURISDICTION

The decision of the United States Court of Appeals for the Seventh Circuit was entered on November 27, 1996. An order was entered on January 28, 1997 granting a petition for rehearing with suggestion for rehearing en banc and vacating the panel decision. The decision of the United States Court of Appeals for the Seventh Circuit on rehearing en banc was entered on August 12, 1997. This Court has jurisdiction to review the judgment in question by writ of certiorari under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

42 U.S.C. § 2000e-2(a)(1)

It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

STATEMENT OF THE CASE

Respondent, Kimberly Ellerth ("Ellerth") brought claims against Petitioner, Burlington Industries, Inc. ("Burlington") in federal court for employment discrimination and constructive discharge. The jurisdiction of the district court was invoked under Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. §2000e et seq. and under 28 U.S.C. §1331 (federal question jurisdiction). The jurisdiction of the district court with respect to Ellerth's constructive discharge claim was invoked under 28 U.S.C. §1367(a) (pendent jurisdiction).

In a per curiam decision containing eight separate opinions, the Seventh Circuit, en banc, reversed the United States District Court and held that employers may be held strictly liable under Title VII of the Civil Rights Act of 1964 on a *quid pro quo* sexual harassment theory even if the allegedly harassed employee neither submitted to a supervisor's sexual advances nor suffered any adverse employment consequences as a result of refusing these advances.

The Seventh Circuit's decision in the instant case is directly contrary to the case law of the District of Columbia Circuit and is inconsistent with the holdings of the First, Second, Fourth, Fifth, Sixth, Eighth, Tenth and Eleventh Circuits. However, the Seventh Circuit's ruling is supported by recent rulings of the Third and Ninth Circuits. The factual and procedural history of this case is as follows:

Burlington hired Ellerth as a merchandising assistant in March, 1993. Three weeks after resigning from Burlington in May, 1994, Ellerth, who had been based in

Chicago, complained for the first time that she had been sexually harassed by Theodore Slowik ("Slowik"), a New York-based vice-president of one of Burlington's divisions, during the course of her employment. Ellerth alleged, inter alia, that Slowik asked inappropriate questions in her preemployment interview, stared at her, told offensive jokes, complimented her physical features, touched her inappropriately and made sexual innuendos to her over the telephone.[1]

According to Ellerth, Slowik also made comments which she claims insinuated that her reaction to his "harassment" would affect her career at Burlington. In the summer of 1993, Ellerth accompanied Slowik to a hotel lounge while on a business trip in North Carolina. She claims that Slowik stated, "You know, Kim, I could make your life very hard or very easy at Burlington."[2] At a promotion interview in March, 1994, Slowik allegedly acknowledged to Ellerth that he had told others that she was "arrogant" and "not loose enough" and that this gave him reservations about promoting her. Within a short period of time she was, in fact, promoted. Ellerth further alleged that she once telephoned Slowik for permission to perform a single, minor project and Slowik responded, "I don't have time for you right now, Kim, unless you're telling me--unless you want to tell me what you are wearing. Finally, in May, 1994, shortly before her resignation, Slowik allegedly asked Ellerth during a telephone conversation,

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[1] While Burlington contests many of these facts, for purposes of the summary judgment and appeal they have been considered as true.

[2] Burlington has contended below that Ellerth is time-barred from basing her claims on this statement.

"Are you wearing shorter skirts yet, Kim, because it would make your job a whole heck of a lot easier."

Ellerth did not submit or otherwise respond to what she perceived as Slowik's sexual advances. Nor is there any evidence that Ellerth suffered any adverse employment consequences as a result of refusing Slowik's alleged advances. On the contrary, Ellerth received a promotion in March, 1994, approximately one year after commencing her employment at Burlington. Slowik interviewed Ellerth for this position and recommended that she be promoted.

Approximately two months after her promotion, Ellerth's direct supervisors began receiving complaints about Ellerth's work. When they (not Slowik) discussed these complaints with Ellerth, she voluntarily resigned.[3]

Ellerth never informed any of her supervisors or any of Burlington's human resources personnel about Slowik's alleged harassment until after her resignation. Ellerth was aware of Burlington's policy regarding sexual harassment. She had received and read Burlington's employee handbook containing this policy. Yet, she chose not to inform her supervisors because she purportedly believed that reporting Slowik's harassment would put her job in jeopardy. This purported belief, however, was not based upon any prior conduct of anyone at Burlington, nor any experience she had had at Burlington. Ellerth simply quit. Ellerth does claim that she informed certain co-workers about Slowik's alleged

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[3] Ellerth initially claimed that Burlington had constructively discharged her because Slowik's alleged harassment forced her to resign. As further discussed *infra*, the district court granted summary judgment for Burlington on Ellerth's constructive discharge claim. The Seventh Circuit did not disturb this holding on appeal.

harassment. Each of these persons denies that Ellerth mentioned any such thing to him or her.

Burlington moved for summary judgment on the grounds that, under the undisputed facts of the case, a reasonable jury could not find it liable for sexual harassment. The district court agreed and entered summary judgment in Burlington's favor. The district court did not believe that Ellerth had intended to advance a *quid pro quo* claim, but held that, in any event, "for Ellerth to prevail on a theory of *quid pro quo* harassment, she would have to prove that Slowik actually withheld tangible employment benefits as a result of her failure to submit to his sexual overtures." (App., *infra*, 264a) Because Ellerth had presented no such evidence, the district court disregarded *quid pro quo* as a basis for recovery. The district court also granted summary judgment for Burlington on Ellerth's hostile work environment claim, holding that Burlington did not have knowledge of Slowik's alleged harassment and therefore was not negligent in failing to prevent it. (App., *infra*, 285a)

Ellerth appealed the district court's ruling to the Seventh Circuit. A three-judge panel of the court of appeals reversed the district court and held that Ellerth had presented sufficient evidence to proceed to the jury under either a *quid pro quo* or a hostile work environment theory. With respect to the former theory, the panel found that Slowik's comments constituted *quid pro quo* propositions which were themselves actionable, notwithstanding the fact that they did not induce Ellerth to submit to Slowik's sexual advances and Slowik never followed through on his implicit threats of retribution. (App. *infra*, 220a-221a) Burlington successfully petitioned the Seventh Circuit for rehearing en banc and the panel opinion was vacated.

On rehearing en banc, the Seventh Circuit issued a per curiam opinion reversing the district court in which Judges Flaum, Kanne, Cudahy, Coffey, Posner, Manion, Easterbrook and Wood each issued separate opinions. In the per curiam portion of its opinion, the court declared, "[u]nfortunately, a majority of the judges has not converged upon a single rationale for the resolution of all of the issues in these cases." (App., *infra*, 2a) The court further postulated, "[p]erhaps in some future cases this court will be able to forge a majority position; perhaps the Supreme Court will bring order to the chaotic case law in this important field of practice." (App., *infra*, 7a)

However, a majority of the judges concurred in the panel's view "that liability for *quid pro quo* harassment is strict even if the supervisor's threat does not result in a company act," i.e., does not result in some adverse employment consequence. (App., *infra*, 7a) Based on this principle, the court held Slowik's alleged *quid pro quo* propositions[4] to be a sufficient basis for Ellerth to defeat summary judgment on her *quid pro quo* claim.[5]

Writing for a plurality of four judges, Judge Flaum held that "a clear and serious *quid pro quo* threat alters the 'terms and conditions' of employment in such a way as to violate Title VII and therefore can constitute an actionable

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[4] Specifically, the panel based this finding on Slowik's alleged comment over the telephone that he did not have time for Ellerth "unless [she] want [ed] to tell [him] what [she was] wearing." (App., *infra*, 221a)

[5] A majority of judges found that Ellerth had waived her hostile work environment claim on appeal and therefore affirmed the district court's entry of summary judgment with respect to that theory. (App., *infra*, 6a)

claim even if the threat remains unfulfilled." (App., *infra*, 17a) Judge Flaum opined that this conclusion was consistent with principles of agency law which hold a principal liable for its agent's exercise of delegated authority and with the intent of the 1991 amendments to the Civil Rights Act which provide compensation for emotional damage. (App., *infra*, 17a-18a) Judge Flaum also declared that imposing strict liability on employers for the unfulfilled *quid pro quo* propositions made by their supervisory employees would further the goals of deterrence:

> [T]here is no justification for distinguishing between those cases in which a supervisor carries through on his threats from those cases in which the employee either submits to the supervisor's demands or in which the supervisor does not act upon his threats. Liability in this situation serves the goal of preventing such abuse from occurring by creating incentives for companies to take steps in hiring and training for their supervisors.

(App., *infra*, 18a)

Chief Judge Posner and Judges Kanne, Manion, Easterbrook and Coffey each submitted separate concurring and dissenting opinions in which they rejected Judge Flaum's view that a supervisor's unfulfilled threats amounted to *quid pro quo* sexual harassment for which an employer could be held strictly liable. Chief Judge Posner reasoned that the strict liability standard should apply only to "company acts," which he defined as "an act that significantly alters the terms or conditions of employment of the victim of sexual harassment." (App., *infra*, 54a) It is only these acts, Chief Judge Posner stated, which are within an employer's

reasonable ability to monitor and control. (App., *infra*, 51a) It would be inappropriate to apply standards of strict liability to "non-company acts" such as unfulfilled threats of job retaliation because this conduct is "outside the channels in which action by supervisors is realistically controllable by their superiors." (App., *infra*, 53a) Chief Judge Posner noted that other circuits have adopted this approach to sexual harassment claims. (App., *infra*, 52a)

In his opinion, Judge Coffey wrote that *quid pro quo* harassment, by its very definition, requires "something for something," that is, an exchange linking an economic benefit to participation in sexual conduct. (App., *infra*, 95a) Thus, a plaintiff claiming *quid pro quo* sexual harassment must allege that she suffered a materially adverse employment action due to the harassment. (App., *infra*, 95a) Judge Coffey also noted that none of the cases relied upon by Judge Flaum in advancing his "attempted *quid pro quo* harassment" doctrine involved merely unfulfilled threats of retaliation. Rather, in each of those cases, the employee either submitted to the supervisor's advances or suffered tangible consequences for refusing to do so. (App., *infra*, 100a-101a)

Judge Coffey also dissented from the majority's holding that *quid pro quo* sexual harassment cases should be judged under a strict liability standard. This standard, said Judge Coffey, was explicitly rejected by this Court in Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1985). (App., *infra*, 64a) In accordance with Meritor, Judge Coffey advocated that employer liability in all sexual harassment cases be governed by a negligence standard. (App., *infra*, 68a-69a) Judge Coffey also contended that the "traditional, tested, true, logical and common-sense parameters of the negligence standard" are better suited for balancing the

interests of employers and workers than the "blunt legal instrument" of strict liability which would "hold [employers] liable for the improper conduct of their supervisory employees regardless of the circumstances." (App., *infra*, 128a)

SUMMARY OF REASONS FOR GRANTING THE WRIT

A conflict exists among the circuit courts of appeals over the elements of a *quid pro quo* sexual harassment claim under Title VII. Specifically, the circuits are divided over whether a plaintiff must establish that the harassment affected tangible aspects of the terms and conditions of employment in order to establish *quid pro quo* sexual harassment. In the instant case, the Seventh Circuit became the first court to directly hold that a supervisor's threat of retaliation linked to sexual advances is in itself sufficient to state a *quid pro quo* claim, even if the employee did not submit to the advances and suffered no adverse job consequences. The Third and Ninth Circuits have also held, in dicta, that *quid pro quo* harassment occurs whenever a supervisor intertwines a request for the performance of sexual favors with a discussion of actual or potential job benefits.

The D.C. Circuit has reached the exact opposite conclusion, holding that threats alone do not amount to *quid pro quo* harassment in the absence of tangible effects on employment. The First, Fourth, Fifth, Sixth, Eighth, Tenth and Eleventh Circuits have each held that *quid pro quo* sexual harassment requires proof of tangible work-related detriment or economic injury. District courts in these circuits have accordingly refused to recognize unfulfilled retaliatory threats, without more, as giving rise to *quid pro*

quo claims. The Second Circuit has also indicated that *quid pro quo* sexual harassment requires either submission to a supervisor's sexual advances or tangible job detriments related to the employee's refusal to submit.

In addition, the strict liability standard which the Seventh Circuit held in the instant case applied to all *quid pro quo* sexual harassment claims is inconsistent with the language and spirit of this Court's holding in Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986), which rejected the principle that employers are automatically liable for sexual harassment committed by their supervisors. Under the principles announced by this Court in Meritor, a strict liability standard is particularly inappropriate in *quid pro quo* sexual harassment claims predicated on mere unfulfilled threats, rather than tangible job detriments, because employers have no effective means of monitoring the "non-company acts" of their supervisors.

Each of these issues is of substantial importance to the administration of Title VII. The standard of liability which is applied to Title VII claims obviously has a significant bearing not only on the outcome of employment discrimination cases but on the factual issues which must be addressed in those cases. The relative scope of the two branches of sexual harassment, *quid pro quo* and hostile work environment, in turn determines the standard of liability to be applied. The proper construction of Title VII is relevant both to the employees who rely upon the act to create and maintain a workplace free from unlawful discrimination and harassment and to employers who must design and implement policies and procedures to eradicate sexual harassment in order to protect themselves from liability.

The Seventh Circuit's splintered per curiam opinion in the instant case typifies the difficulty which courts have had in grappling with the elusive distinctions between *quid pro quo* and hostile work environment sexual harassment, the proper legal standards to be applied under Title VII and the balance which must be maintained between the sometimes competing interests of employees and employers. As a consequence, the Seventh Circuit has, in the instant case, expressly requested this Court's valuable guidance in resolving the issues raised in this Petition.

REASONS FOR GRANTING THE WRIT

I. THE CIRCUIT COURTS OF APPEAL ARE IN CONFLICT REGARDING WHETHER *QUID PRO QUO* SEXUAL HARASSMENT REQUIRES TANGIBLE EFFECTS ON THE TERMS AND CONDITIONS OF EMPLOYMENT OR WHETHER THREATENED EFFECTS ARE SUFFICIENT

In the instant case, the Seventh Circuit has rejected the rule adopted by a majority of circuits which requires a plaintiff to prove, as an element of a Title VII *quid pro quo* sexual harassment claim, that the harassment affected tangible aspects of the employee's compensation, terms, conditions or privileges of employment. Instead, the Seventh Circuit has held that "a clear and serious *quid pro quo* threat alters the 'terms and conditions' of employment in such a way as to violate Title VII and therefore can constitute an actionable claim even if the threat remains unfulfilled." (App., *infra*, 17a) The court has further held that "a supervisor's *quid pro quo* threat, i.e., a threat that clearly conditions concrete job benefits or detriments on compliance

with sexual demands, can be imputed to the employer for purposes of liability." (App., *infra*, 17a) Thus, in the Seventh Circuit, an employer may be held strictly liable under Title VII for *quid pro quo* sexual harassment although the plaintiff neither submitted to a supervisor's sexual advances nor suffered any adverse job consequences from refusing to do so. The employer's liability would attach the second the words are uttered.

The Seventh Circuit is not alone in this view. Approximately one month before the Seventh Circuit issued its en banc opinion in this case, the Third Circuit decided Robinson v. City of Pittsburgh, ___ F.3d ___, No. 95-3594, 1997 WL 386102 (3d Cir. July 14, 1997).[6] There, the Third Circuit adopted the definition of *quid pro quo* sexual harassment set forth in the Guidelines of the Equal Employment Opportunity Commission. Those guidelines state, in pertinent part:

> Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment [or] (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individuals . . .

[6] Although Robinson was decided before the instant case, it is not cited by any of the eight judges contributing separate opinions to the Seventh Circuit's lengthy decision.

29 C.F.R. § 1604.11(a). Based on these standards, the court held, "a *quid pro quo* violation occurs at the time when an employee is told that his or her compensation, etc. is dependent upon submission to unwelcome sexual advances. At this point, the employee has been subjected to discrimination because of sex. . . . Whether the employee thereafter submits to or rebuffs the advances, a violation has nonetheless occurred." 1997 WL 386102 at *7.[7]

The Ninth Circuit has likewise adopted the EEOC Guidelines as the standard for defining *quid pro quo* sexual harassment. Heyne v. Caruso, 69 F.3d 1475, 1478 (9th Cir. 1995); Nichols v. Frank, 42 F.3d 503, 511 (9th Cir. 1994). In Nichols, the court stated that "*quid pro quo* sexual harassment occurs whenever an individual explicitly or implicitly conditions a job, a job benefit, or the absence of a job detriment, upon an employee's acceptance of sexual conduct." 42 F.3d at 511. The court further held "that a supervisor's intertwining of a request for the performance of sexual favors with a discussion of actual or potential job benefits or detriments in a single conversation constitutes *quid pro quo* sexual harassment." Id. at 513. Thus, the Ninth Circuit has clearly signalled that a supervisor's unfulfilled retaliatory *quid pro quo* threat would be sufficient to trigger the strict liability standard.[8]

[7] This conclusion was not necessary, however, to the Third Circuit's holding in Robinson. There, the court found that the plaintiff, a police officer, had been prevented from transferring to a detective division due to her refusal to engage in sexual relations with a superior officer. 1997 WL 386102 at *8. Therefore, the supervisor's *quid pro quo* threats had affected tangible aspects of the plaintiff's employment.

[8] As in Robinson, both Heyne and Nichols involved circumstances where the employee either submitted to the supervisor's sexual advances

(continued...)

The Seventh, Third and Ninth Circuits are, however, in the minority. In Gary v. Long, 59 F.3d 1391 (D.C. Cir. 1995), cert. denied, 116 S.Ct. 569 (1995), the District of Columbia Circuit rejected an employee's *quid pro quo* sexual harassment claim where the employee had produced no evidence that her supervisor's sexual advances had any tangible effects on her employment. There, the plaintiff's supervisor first promised that he would "make her job easier" if she would have sex with him and then threatened various reprisals, including termination, if she refused to have sex with him. 59 F.3d at 1393-94.

The D.C. Circuit nonetheless held that the plaintiff could not state a *quid pro quo* claim against her employer because she had adduced no evidence that the supervisor's threats were ever carried out. Id. at 1396. The court declared, "it takes more than saber-rattling alone to impose *quid pro quo* liability on an employer; the supervisor must have wielded the authority entrusted to him to subject the victim to adverse job consequences as a result of her refusal to submit to unwelcome sexual advances." 59 F.3d at 1396. The absence of such consequences in that case precluded the plaintiff from proceeding under a *quid pro quo* theory.

The First, Fourth, Fifth, Sixth, Eighth, Tenth and Eleventh Circuits have defined *quid pro quo* harassment consistently with the holding in Gary. Each of these circuits has eschewed the EEOC Guidelines' definition and has held

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[8](...continued)
or was subjected to adverse employment consequences. Heyne, 69 F.3d at 1478-79; Nichols, 42 F.3d at 513. The Seventh Circuit is therefore the first circuit court to actually recognize a *quid pro quo* harassment claim where the plaintiff neither submitted to the advances nor suffered tangible effects on the terms of employment.

that an essential element of a *quid pro quo* claim is that the harassment affect tangible aspects of the plaintiff's employment. Lipsett v. University of Puerto Rico, 864 F.2d 881, 898 (1st Cir. 1988) (an essential element of *quid pro quo* harassment is that the employee "was subject to unwelcome sexual advances by a supervisor or teacher and . . . that his or her reaction to these advances affected tangible aspects of his or her compensation, terms, conditions or privileges of employment . . . ."); accord Chamberlin v. 101 Realty, Inc., 915 F.2d 777, 783 (1st Cir. 1990) (quoting Lipsett); Spencer v. General Electric Co., 894 F.2d 651, 658 (4th Cir. 1990) (essential element of a *quid pro quo* sexual harassment claim is that "[t]he employee's reaction to the harassment affected tangible aspects of the employee's compensation, terms, conditions or privileges of employment"); Ellert v. University of Texas, at Dallas, 52 F.3d 543, 545 (5th Cir. 1995) (*quid pro quo* harassment claim requires proof that the employee's "reaction to the harassment affected tangible aspects of the terms and conditions of her employment"); Kauffman v. Allied Signal, Inc., 970 F.2d 178, 187 (6th Cir.), cert. denied, 506 U.S. 1041 (1992) (requiring in a *quid pro quo* claim that the plaintiff's reaction to the harassment have affected tangible aspects of employment and permitting employer to rebut plaintiff's allegations by showing that the harassment had no tangible affect on terms and conditions of employment); Cram v. Lamson & Sessions Co., 49 F.3d 466, 473 (8th Cir. 1995) (employee must prove that "submission to the unwelcome advances was an express or implied condition for receiving job benefits or her refusal to submit resulted in a tangible job detriment"); Sauers v. Salt Lake County, 1 F.3d 1122, 1127 (10th Cir. 1993) (claim for *quid pro quo* harassment may lie only "[i]f the plaintiff can show that she suffered an economic injury from her supervisor's actions"); accord Hicks v. Gates Rubber Co.,

833 F.2d 1406, 1414 (10th Cir. 1987) ("[t]he gravamen of a *quid pro quo* sexual harassment claim is that tangible job benefits are conditioned on an employee's submission to conduct of a sexual nature and that adverse job consequences result from the employee's refusal to submit to the conduct"); Sparks v. Pilot Freight Carriers, Inc., 830 F.2d 1554, 1564 (11th Cir. 1987) (element of *quid pro quo* harassment claim is "that the employee's reaction to the harassment complained of affected tangible aspects of the employee's compensation, or terms, conditions or privileges of employment").

The Second Circuit has likewise consistently defined *quid pro quo* sexual harassment as requiring proof that the plaintiff was denied an economic benefit due to the rejection of a supervisor's sexual advance. Saulpaugh v. Monroe Community Hosp., 4 F.3d 134, 142 (2d Cir. 1993), cert. denied, 510 U.S. 1164 (1994); Kotcher v. Rosa and Sullivan Appliance Ctr., Inc., 957 F.2d 59, 62 (2d Cir. 1992); Carrero v. New York City Housing Authority, 890 F.2d 569, 579 (2d Cir. 1989). Although the Second Circuit expanded the scope of *quid pro quo* harassment in Karibian v. Columbia University, 14 F.3d 773 (2d Cir.), cert. denied, 512 U.S. 1213 (1994), by holding that loss of an economic benefit is unnecessary where the employee has submitted to the supervisor's sexual demands, the court specifically stated that this holding was consistent with Kotcher and Carrero. 14 F.3d at 778-79. Thus, it appears that the Second Circuit also requires either submission to a supervisor's sexual advances or a tangible job detriment in order to make out a *quid pro quo* claim.

Although these courts of appeals have not had the opportunity to consider a case where the plaintiff attempts to base a *quid pro quo* harassment claim solely on unfulfilled

retaliatory threats, district courts in these circuits have rejected such claims. See Johnson v. Runyon, 928 F. Supp. 575 (D. Md. 1996) (granting summary judgment in favor of employer on a *quid pro quo* harassment claim because the plaintiff had failed to prove that her refusal to sleep with her supervisor was the cause of her negative evaluations); Cuesta v. Texas Dep't of Criminal Justice, 805 F. Supp. 451, 457 (W.D. Tex. 1991) (holding that a supervisor's repeated remark to a female employee that "I'll take care of you if you take care of me" did not create grounds for a *quid pro quo* claim where the remarks did not result in a tangible job detriment).

The disagreement between the circuits creates a substantial risk of inconsistent outcomes in sexual harassment cases brought under Title VII. Presently, in a majority of federal courts, if a plaintiff cannot show that a supervisor's alleged sexual harassment had tangible effects on the terms and conditions of employment, the conduct is actionable only under a hostile work environment theory. Under the negligence standard applicable to hostile work environment claims, the employer may defend itself by showing that it neither knew nor had reason to know of the harassment and that it reacted reasonably upon learning of the plaintiff's allegations. However, in the Third, Seventh and Ninth Circuits, if an employee alleges that a supervisor linked his or her sexual advances to job-related benefits or detriments, the employer becomes strictly liable and must prove that the conduct never occurred in order to avoid liability.

The majority approach to *quid pro quo* sexual harassment is more sound and better balances the interests of employees and employers. Assuming, arguendo, that strict liability is the proper standard to be applied to *quid pro quo*

sexual harassment claims,[9] the rationale for applying the standard is that, under agency principles, when a supervisor implements an employment benefit or detriment based upon an employee's receptiveness to sexual advances, the supervisor is using the authority delegated by the employer and therefore acts as the employer. (App., *infra*, 12a); see also Kotcher, 957 F.2d at 59; Steele v. Offshore Shipbuilding, Inc., 867 F.2d 1311, 1316 (11th Cir. 1989.) In such circumstances, the employer knows or should know of the decision because, to borrow Chief Judge Posner's terminology, the supervisor has engaged in a "company act." (App., *infra*, 51a)

The same is not true when a supervisor threatens retaliation due to an employee's rejection of his or her sexual advances, but fails to act upon these threats. Here, the supervisor has not actually used any authority delegated by the employer; at most, he has only contemplated doing so. Because employers cannot monitor every interaction between supervisors and their subordinates, they cannot be aware of a *quid pro quo* threat because no actual job action has occurred. Imposing strict liability in such circumstances would create a draconian burden on employers who are already taking extensive measures to combat harassment. This situation is most analogous to that of co-employee sexual harassment which creates a hostile work environment in that the employer has not granted or withheld an employment benefit based on sex and will not necessarily be aware of the harassment. In part due to courts' recognition that employers cannot possibly be responsible for every unofficial action taken by their employees in the workplace, a negligence standard applies to hostile work environment

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[9] As further discussed below, Petitioner asserts that the use of this standard is improper and contrary to this Court's decision in Meritor.

claims. (App., *infra*, 22a-23a) For this same reason, an unfulfilled *quid pro quo* threat should be regarded as evidence of a hostile work environment and held to a negligence standard, rather than as independently actionable conduct for which the employer may be held strictly liable.

The Seventh Circuit's categorization of unfulfilled retaliatory threats as *quid pro quo* sexual harassment is also likely to greatly expand the number of sexual harassment claims brought under a *quid pro quo* theory and decrease the number of cases which may be resolved at the summary judgment stage. Whereas under the majority view a plaintiff must produce evidence of tangible damages in order to proceed on a *quid pro quo* claim, if mere threats are indeed actionable as *quid pro quo* harassment, a plaintiff need only allege that a supervisor's offensive conduct was linked to a job detriment or benefit. Thus, many claims which were previously adjudicated under the negligence standard associated with a hostile work environment theory will be transformed into strict liability *quid pro quo* cases.[10] Because these cases will often depend upon resolution of the conflicting testimony of the plaintiff and the accused supervisor, they will be incapable of resolution at the summary judgment stage. The resulting increase in jury trials will further burden the already overtaxed federal judiciary and increase employers' Title VII-related litigation costs.

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[10] It is reasonable to expect that at least some of these "threat-only" *quid pro quo* claims will be of dubious merit.

II. APPLICATION OF A STRICT LIABILITY STANDARD TO TITLE VII CLAIMS IS CONTRARY TO THIS COURT'S DECISION IN MERITOR

A. Under Meritor, a Negligence Standard Should be Applied to All Title VII Sexual Harassment Claims, Including *Quid Pro Quo* Claims

Over ten years ago, this Court addressed the standard of liability which should be applied to sexual harassment claims brought pursuant to Title VII in Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986). The plaintiff in Meritor claimed that she had "constantly been subjected to sexual harassment" by her supervisor over a four year period. This harassment consisted of repeated requests for sexual relations, uninvited fondling and exposure and several instances of forcible rape. The Court of Appeals had reversed the district court's verdict for the employer on the grounds that the district court had failed to consider plaintiff's claim under a hostile work environment theory as well as a *quid pro quo* theory. The Court of Appeals had also held "that an employer is absolutely liable for sexual harassment practiced by supervisory personnel, whether or not the employer knew or should have known about the misconduct." 477 U.S. at 63.

This Court rejected the standard of "absolute" liability advanced by the Court of Appeals. 477 U.S. at 72. Although this Court declined to state a definitive rule governing employer liability under Title VII, it stated that Congress intended for courts to be guided by agency principles in determining the proper standards of liability. Id. This Court held that Congress' decision to define an

"employer" for purposes of Title VII to include an "agent" of an employer "surely evinces an intent to place limits on the acts of employees for which employers under Title VII are to be held liable." Id.

Despite this Court's rejection in Meritor of an "absolute" liability standard for Title VII claims, the Seventh Circuit and other Courts of Appeal have continued to apply a standard of strict liability to certain sexual harassment claims. Under the bifurcated scheme adopted by the Seventh Circuit in the instant case, employers are strictly liable for supervisory *quid pro quo* harassment, but not for hostile work environment sexual harassment. (App., *infra*, 21a-23a)[11]

In his opinion in this case, Judge Flaum concedes that application of strict liability to *quid pro quo* claims is grounded only weakly, if at all, in the traditional agency principles set forth in the Restatement (2d) of Agency. Section 219(1) of the Restatement provides that an employer is liable for the torts of an employee committed while acting within the scope of employment. Section 228(1) in turn provides that conduct is within the scope of an employee's employment if and only if:

> (a) it is the kind he is employed to perform;

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[11] At least seven other circuits have also generally adopted a strict liability standard for *quid pro quo* harassment. See Davis v. City of Sioux City, 115 F.3d 1365, 1367 (8th Cir. 1997); Nichols, 42 F.3d at 513-14; Bouton v. BMW of North America, Inc., 29 F.3d 103, 106-07 (3d Cir. 1994); Karibian, 14 F.3d at 777; Sauers, 1 F.3d at 1127; Kauffman, 970 F.2d at 185-86; Steele, 867 F.2d at 1316.

(b) it occurs substantially within the authorized time and space limits;

(c) it is actuated, at least in part, by a purpose to serve the master, and;

(d) if the force is intentionally used by the servant against another, the use of force is not unexpectable by the master.

Restatement (2d) of Agency, § 228(1). As Judge Flaum admits, this test "appears to have little relevance in the sexual harassment setting." (App., *infra*, 12a)

Some courts have also imposed strict liability pursuant to Section 219(2)(d) of the Restatement. This section provides that an employer may be liable for the acts of an employee occurring outside of the scope of employment where "the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or was aided in accomplishing the tort by the existence of the agency relation." Restatement (2d) of Agency, § 219(2)(d). However, the circuit courts of appeal have also been divided over the meaning of this provision and its application to Title VII. Compare Bouton, 29 F.3d at 108 (holding that Section 219(2)(d) applies only when the supervisor is acting with apparent authority of the employer) with Karibian, 14 F.3d at 780 (holding that under Section 219(2)(d), strict liability is appropriate where supervisor acts either with apparent authority or pursuant to any authority delegated to him by the employer).

The conclusion which the Seventh Circuit reached in the instant case is that the Restatement approach should be abandoned altogether. (App., *infra*, 12a) Rather, said the

Seventh Circuit, courts should create their own "federal common law" agency principles in the context of Title VII. (App., *infra*, 12a-14a) These principles appear to be based, at least in part, on what standard of liability the court deems to be appropriate. (App., *infra*, 14a-16a) In this case, the Seventh Circuit determined that application of strict liability to supervisory *quid pro quo* harassment would "better serve the goal of deterrence." (App., *infra*, 16a)

The lower courts' confusion over the proper standard to be applied to Title VII sexual harassment and their inability to settle on a single source of agency law to guide this determination signifies, at the very least, that clarification by this Court would be appropriate. Moreover, the Seventh Circuit's inability to support its strict liability standard under the principles of the Restatement and its resort instead to creating "federal common law" suggests that application of a strict liability standards to *quid pro quo* sexual harassment claims is inconsistent with both Congressional intent and with this Court's decision in Meritor.

This Court indicated in Meritor that agency principles should be used to limit employer liability under Title VII. Instead, the Seventh Circuit and other courts appear to be using these principles to expand liability in Title VII cases beyond that authorized by the express language of the statute. Generally, strict liability is applied when a person stands in a unique position to prevent a foreseeable harm to another. See Restatement (2d) of Torts, §§ 519 & 520; Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 63, 377 P.2d 897, 901 (1963) (discussing application of strict liability to product liability cases). However, as a practical matter, an employer is without the ability to prevent workplace *quid pro quo* sexual harassment. Attempting to

eradicate this problem would require invasive monitoring of the behavior of hundreds or even thousands of supervisory employees performing different functions in different locales, each of whom must be given some level of discretion to perform their jobs. In this context, strict liability places an impossible burden on employers while at the same time encroaching on employee privacy.

This is not to say that employers are powerless to deter or reduce sexual harassment in the workplace or that an employer's inattention to or casual treatment of sexual harassment should not form the basis for liability. However, the adequacy of an employer's efforts in this regard should be judged by a standard of reasonableness, not by whether the employer has been successful in completely stamping out a deeply rooted societal malady. Under a negligence standard, an employer's culpability for supervisory sexual harassment can be assessed in the context of all relevant circumstances. By contrast, the strict liability standard which the Seventh Circuit and other courts have applied focuses only on whether the harassment has occurred, not what the employer could or should have done to prevent it or to prevent it from reoccurring.

The lower courts have adopted a standard of strict liability with respect to supervisory *quid pro quo* sexual harassment claims which has no explicit basis in either Title VII or agency law and appears to be inconsistent with the principles this Court elaborated in Meritor. These courts have been divided among themselves as to the legal basis for imposing this standard. In light of the considerable confusion both within the Seventh Circuit and among lower courts generally since Meritor was decided and the serious questions which exist regarding the propriety of the strict

liability standard, this issue is ripe for revisitation by this Court.

B. A Strict Liability Standard Should Not Be Applied to *Quid Pro Quo* Harassment Claims Which Do Not Involve Either Submission by the Employee or an Adverse Affect on Tangible Aspects of Employment

A strict liability standard is particularly inappropriate with respect to the type of *quid pro quo* claims which the Seventh Circuit recognized in the instant case -- those in which the plaintiff does not allege that she either submitted to a supervisor's sexual advances or suffered any tangible effects on her employment. In a "traditional" *quid pro quo* claim, the plaintiff alleges that an employment decision was made based on his or her willingness or unwillingness to engage in sexual relations with a supervisor. Although Petitioner contends that the application of strict liability is inappropriate in any Title VII context, in a case involving "traditional" claims, the employer will at least have notice of the decision which was made though not necessarily the basis for it. Theoretically, but not in practice, an employer can weed out *quid pro quo* harassment through aggressive scrutiny of promotions, demotions, performance reviews and the like for retaliatory or other impermissible motives. In addition, under these circumstances, the job decision is a "company act," in that the supervisor is actually exercising delegated authority.

As also discussed in Section I above, none of these justifications for a strict liability standard exist where a *quid pro quo* harassment claim is based on an unfulfilled retaliatory threat or other "non-company" act. In these circumstances, the employer will have no official notice nor

any record of the action which gives rise to the plaintiff's claim because no tangible effect on the plaintiff's employment status is necessary to make out such a *quid pro quo* claim. Furthermore, the employer will not have, through its supervisory employee, acted in any official capacity toward the employee. Avoiding liability under a strict liability standard will literally require employers to monitor every interaction between supervisory and other employees. Such scrutiny, even if it could be accomplished, would be prohibitively expensive, functionally impossible and unduly invasive of employee privacy.

Congress simply cannot have intended for Title VII to make employers responsible for the behavior of their supervisory employees at all times and all places. Congress likewise cannot have intended for employers to be liable for actions of which they have no notice and no reasonable means of acquiring notice and which cannot reasonably be imputed to them under agency principles. Thus, even if this Court were to find that some *quid pro quo* sexual harassment claims are entitled to be held to a strict liability standard, there must be limits. This standard should not apply to the types of "threat-only" *quid pro quo* cases which the Seventh Circuit recognized in the instant case.

III. RESOLVING THE PROPER SCOPE OF *QUID PRO QUO* SEXUAL HARASSMENT AND THE PROPER STANDARD OF LIABILITY UNDER TITLE VII IS IMPORTANT TO BOTH EMPLOYEES AND THE BUSINESS COMMUNITY

It is clear that the issues of whether proof of tangible job detriment is necessary to state a *quid pro quo* sexual harassment claim and what standard of liability should be

applied to sexual harassment cases each have important effects on how Title VII is applied to the American workplace. Applying a standard of strict liability, rather than negligence, to such claims shifts the relevant inquiry in Title VII sexual harassment cases from the nature of the proactive measures which the employer has taken to prevent workplace harassment and the diligence of the employer in addressing allegations of such harassment to the simple question of whether the *quid pro quo* threat occurred. The difference in standards will have an outcome-determinative effect on numerous cases. The ease with which employer liability can be established is likely to affect the number of cases filed and the workload of the federal judiciary in administering those cases.

Construing *quid pro quo* harassment to encompass situations where an employee has neither submitted to a supervisor's sexual advances nor suffered any tangible job detriment represents a significant expansion of that doctrine. Broadening the scope of *quid pro quo* harassment will place more sexual harassment claims under the umbrella of strict liability, as opposed to the negligence standard generally applicable to hostile work environment sexual harassment claims.

Thus, the resolution of these questions has substantial implications for both employees and employers. Application of a strict liability standard to sexual harassment claims requires employers to do more than simply utilize reasonable measures to educate their employees about workplace harassment and react swiftly and effectively to known instances of harassment. In order to avoid liability, employers must prevent harassment from occurring at all, which is virtually impossible. Attempting to do so obviously requires pervasive monitoring of supervisor conduct and

rigorous review of employment decisions. Expanding the concept of *quid pro quo* sexual harassment to cover circumstances where an employee has suffered only from sexual advances linked to employment benefits or detriments, as opposed to tangible economic or other detriments, exacerbates this burden.

Obviously, increasing employers' liability for sexual harassment entails significant monetary costs. Diligent employers already incur substantial costs in attempting to create a harassment-free workplace. These expenses include those involved in educating employees as to proper workplace conduct, hiring additional human resources personnel, developing procedures for responding to allegations of sexual harassment, conducting thorough investigations of such allegations and monitoring employment decisions for improper motives. These costs are in addition to the substantial amounts which employers spend each year in defending themselves from liability in existing cases. Further expanding employer liability would make this economic burden overwhelming. While the employers shoulder these costs initially, they are inevitably passed on to shareholders, workers and consumers. Moreover, the burdens which employment discrimination laws place on employers influence employers' decisions to automate production, to outsource duties and to locate operations in foreign countries. Thus, the resolution of the issues raised in this Petition are likely to have economic ramifications far beyond the parties to this case or even Title VII litigants generally.

CONCLUSION

The Petitioner respectfully requests that this Court issue a writ of certiorari to review the judgment and opinion of the Seventh Circuit Court of Appeals in order to resolve a conflict among the circuit courts of appeal regarding the elements of a Title VII *quid pro quo* sexual harassment claim, and to clarify the standard of liability to be applied to such *quid pro quo* claims.

Respectfully submitted,

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Appendix

APPENDIX A

In the United States Court of Appeals for the Seventh Circuit

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No. 95-3128

ALICE JANSEN,

Plaintiff-Appellant,

v.

PACKAGING CORPORATION OF AMERICA,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 94 C 478; Milton I. Shadur, Judge.

ARGUED MAY 15, 1996
REARGUED EN BANC FEBRUARY 25, 1997
DECIDED AUGUST 12, 1997

No. 96-1361

KIMBERLY B. ELLERTH,

Plaintiff-Appellant,

v.

BURLINGTON INDUSTRIES, INC.,

Defendant-Appellee.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 95 C 839; Ruben Castillo, Judge.

ARGUED SEPTEMBER 9, 1996
DECIDED NOVEMBER 27, 1996
REARGUED EN BANC FEBRUARY 25, 1997
DECIDED AUGUST 12, 1997

Before POSNER, *Chief Judge*, and CUMMINGS, BAUER,* CUDAHY,** COFFEY, FLAUM, EASTERBROOK, MANION, KANNE, ROVNER, DIANE P. WOOD,*** and EVANS, *Circuit Judges*.

PER CURIAM. We have consolidated for decision two appeals reargued en banc on the same day. Although the makeup of the en banc court is slightly different in the two cases,**** the similarity of the issues has persuaded us to treat the cases together. Unfortunately, a majority of the judges has not converged upon a single rationale for the resolution of all the issues in these cases. The purpose of this per curiam opinion is to describe the cases briefly, to announce the

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* In No. 96-1361 (*Ellerth*) only. Senior Circuit Judge Bauer was a member of the panel before which the *Ellerth* appeal was first argued.

** In No. 95-3128 (*Jansen*) only. Senior Circuit Judge Cudahy was a member of the panel before which the *Jansen* appeal was first argued.

*** All references in this and the accompanying opinions to "Judge Wood" are to Judge Diane P. Wood, not to Judge Harlington Wood, Jr., who did not participate in these cases.

**** See notes * and ** above. Circuit Judge Ripple did not participate in the consideration or decision of either case. All the other active judges participated in the consideration and decision of both cases.

outcomes and indicate the basic lines of agreement and disagreement, to articulate the court's unanimous view with regard to the disposition of the state law issues, and to refer the reader to the separate, signed opinions that follow.

Both cases primarily charge sexual harassment of a female employee by a supervisory employee in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq*. And in both the plaintiff is appealing from a grant of summary judgment.

In *Jansen*, with which we begin, the plaintiff has additional claims—of retaliation in violation of Title VII and of intentional infliction of emotional distress in violation of the common law of Illinois. The entire court believes that the district judge was right to grant summary judgment for the defendant, Packaging Corporation of America, on both these claims. Some of the alleged acts of retaliation are outside the scope of Jansen's EEOC charge and are therefore waived. As for the other acts, PCA presented noninvidious reasons for them (for example, that Jansen was assigned a lunch hour—one of the alleged retaliatory acts—in order to assure that the phone in her department would be manned at all times). Since Jansen presented neither evidence that these reasons were mere pretexts nor any other evidence from which retaliatory intent could be inferred, the company was entitled to summary judgment. *Dunning v. Simmons Airlines, Inc.*, 62 F.3d 863, 868-69 (7th Cir.1995). As for Jansen's claim of intentional infliction of emotional distress, it is preempted by the Illinois Human Rights Act, which confines claims of "civil rights violation" under Illinois law to proceedings under the Act. 775 ILCS 5/8-111(C). Sexual harassment is one of the civil rights violations specified in the Act, 775 ILCS 5/2-102(D), and Illinois' highest court has held therefore that common law tort claims that depend on allegations of sexual harassment may be brought only under

the Act. *Geise v. Phoenix Co. of Chicago, Inc.*, 159 Ill.2d 507, 203 Ill.Dec. 454, 639 N.E.2d 1273, 1276-78 (Ill.1994). Jansen's common law claim of infliction of emotional distress is supported by the identical factual allegations of her Title VII claims and is therefore preempted.

Jansen's principal claim is of sexual harassment in violation of Title VII. She was hired by PCA as a secretary to Al Antoni, the manager of the Tooling Services Department of PCA's Wheeling, Illinois plant. She has presented evidence that he subjected her to undesired and offensive sexual advances. He once intimated to her that he would hold up her raise if she didn't have sex with him. He held it up for a time, but eventually she did receive it and it was made retroactive. The incident with the raise is the core of her claim that she was subjected to what is known in the case law of sexual harassment under Title VII as "quid pro quo" harassment. In addition, she complains that Antoni's repeated advances created a hostile working environment. Reargument in *Jansen* was granted in advance of the release of the panel opinion.

Ellerth was employed in marketing in the Chicago office of the mattress-fabric division of Burlington Industries. Theodore Slowik, the division's vice president for sales and marketing, was not Ellerth's immediate supervisor, and was based in New York; but he was her supervisor's supervisor, and as such saw her in the course of business on a regular basis. He made sexual advances to her over a period of a year or so and from time to time intimated that she would not be promoted or otherwise do well at Burlington Industries unless she submitted to his advances. Ellerth argues that Slowik's conduct placed Burlington Industries in violation of Title VII on both a quid pro quo and a hostile-environment theory.

With regard to Jansen's claim of hostile-environment harassment, the entire court agrees that an employer who is

negligent in the hiring, supervision, monitoring, or retention of the plaintiff's supervisor (Antoni) is liable for the supervisor's sexual harassment and that the plaintiff has submitted enough evidence of PCA's negligence to create a triable issue, so that summary judgment should not have been granted to PCA. All the judges with the exception of Judges Easterbrook, Rovner, and Wood believe that negligence is the only proper standard of employer liability in cases of hostile-environment sexual harassment even if as here the harasser was a supervisor rather than a coworker of the plaintiff. The view of these judges is set forth in Judge Flaum's opinion, which is joined by Judges Cummings, Bauer (as to No. 96-1361 (*Ellerth*)), Cudahy (as to No. 95-3128 (*Jansen*)) (with the reservations indicated in Judge Cudahy's separate opinion), Kanne (with the reservations indicated in Judge Kanne's separate opinion), and Evans; in Chief Judge Posner's opinion, which is joined by Judge Manion; in Judge Manion's opinion, which is joined by Chief Judge Posner; and in Judge Coffey's opinion. Judges Easterbrook, Rovner, and Wood, as explained in Judge Easterbrook's and Judge Wood's opinions, believe that the proper standard of employer liability in all cases of sexual harassment by a supervisor is respondeat superior, provided, however, that the harassment was committed by the supervisor in the course of exercising his actual or apparent supervisory responsibilities, was foreseeable, and subjects the employer to liability under the principles of the applicable state law. The view that the proper standard of care in cases of a supervisor's creation of a hostile working environment is negligence is thus the law of the circuit, as it is the majority's view.

Judge Flaum's opinion concludes that Jansen has a viable quid pro quo claim, as do Judges Easterbrook, Rovner, and Wood, though their route to this conclusion is different, as they do not believe that there should be any different

standard for an employer's liability for supervisors' harassment depending on whether it is hostile-environment harassment or quid pro quo harassment. Chief Judge Posner and Judges Coffey and Manion disagree that Jansen has a viable quid pro quo claim, Chief Judge Posner and Judge Manion because they believe that strict liability for quid pro quo harassment should be limited to "company acts" (such as firing or demoting), as distinct from mere threats, and Judge Coffey because he rejects strict liability in quid pro quo cases and also because he deems Jansen to have waived her quid pro quo claim.

In Ellerth's case, the panel decision, reversing the grant of summary judgment, was issued, 102 F.3d 848 (7th Cir.1996), but, as is our practice, was vacated when rehearing en banc was granted. Judge Wood's opinion for the panel had held that Ellerth had presented enough evidence both of quid pro quo harassment, and of hostile environment harassment by a supervisory employee, to create triable issues, so that summary judgment should not have been granted to Burlington Industries either. All the judges except Judges Easterbrook, Rovner, and Wood believe that the hostile-environment claim was expressly waived by Ellerth in her briefs to the panel and that the dismissal of this claim should therefore be affirmed. All the judges except Chief Judge Posner and Judges Coffey and Manion believe that Ellerth's evidence of quid pro quo harassment was sufficient to create a genuine issue of material fact, thus precluding summary judgment, although the routes to this conclusion are different. As noted earlier, Chief Judge Posner and Judge Manion believe that an employer's liability for quid pro quo harassment should be limited to company acts, as explained in their opinions, as opposed to mere threats by the supervisor, and there were no company acts here. Judge Coffey believes, as also noted earlier, that there is no strict

liability in a quid pro quo case and that there is no proof of negligence on the part of Burlington Industries with respect to Slowik's harassment of Ellerth.

The court's inability to forge a majority position with regard to the proper standard for evaluating an employer's liability for sexual harassment by a supervisory employee means that panels of the court that have similar cases in the future, and the district judges of this circuit on remand in these cases and in similar future cases, will have to determine and be guided by the narrowest grounds for the decisions in these two cases. *Marks v. United States*, 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977). Perhaps in some future case this court will be able to forge a majority position; perhaps the Supreme Court will bring order to the chaotic case law in this important field of practice. In the meantime, it is important for the district courts of this circuit to recognize in this welter of opinions that certain views *do* command a majority within our court: in particular, that the standard for employer liability in cases of hostile-environment sexual harassment by a supervisory employee is negligence, not strict liability, and that liability for quid pro quo harassment is strict even if the supervisor's threat does not result in a company act. These principles will bind the panels of this court and the district courts of this circuit until the Supreme Court resolves the issues.

In accordance with the foregoing discussion, the judgment in *Jansen* is affirmed with respect to the claims of retaliation and intentional infliction of emotional distress, and is otherwise reversed and remanded; the judgment in *Ellerth* is affirmed with respect to the claim of hostile-environment harassment but is reversed with respect to the claim of quid pro quo harassment; both cases are remanded to the district court for further proceedings not inconsistent with this opinion.

FLAUM, *Circuit Judge*, joined by CUMMINGS, BAUER (in No. 96-1361), CUDAHY (in 95-3128), KANNE (in part), and EVANS, *Circuit Judges*. Title VII makes it unlawful for any employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). It is well established that this language encompasses a prohibition on sexual harassment in the workplace. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 114 S.Ct. 367, 370, 126 L.Ed.2d 295 (1993); *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 63, 64-65 (1986). In *Meritor* the Supreme Court instructed that traditional agency principles should guide employer liability rules in the harassment context. 477 U.S. at 72. The Court also cautioned, however, that "such common law principles may not be transferrable in all their particulars to Title VII." *Id.* Accordingly, while I believe that agency principles should inform and "limit" this court's analysis of employer liability, *see id.*, I share Chief Judge Posner's concern that an undue reliance on the *Restatement 2d of Agency* ("*the Restatement*") could obscure the issues at stake.[1] A frank discussion of the policies underlying this federal imposition of liability upon an employer is necessary.

The original objective of Congress in enacting Title VII of the Civil Rights Act was to achieve equality in employment opportunities through the eradication of discriminatory barriers. *See Griggs v. Duke Power Co.*, 401

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[1] I also second the Chief Judge's observations regarding the wisdom of looking to state law to derive our agency principles. *See* Posner, pp. 35- 38. With the potential for significant differences among state interpretations of agency law, Title VII remedies (available only against an employer) would be heavily dependent upon vagaries of regionalism. In light of the history giving rise to the Civil Rights Act, it is hard to imagine that this was an end envisioned by Congress.

U.S. 424, 430-31, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971). By definition, harassment that alters the terms and conditions of employment—as it must to be actionable, *see Meritor*, 477 U.S. at 67—denies its victims (almost invariably women) an opportunity to succeed equal to that of employees who remain free of such intolerable treatment. To further the goals of the Civil Rights Act, therefore, the imposition of liability under Title VII seeks to deter harassment, and our resolution of this issue, to the fullest extent possible, should be geared toward minimizing its occurrence. *See* 29 C.F.R. § 1604.11(f) ("Prevention is the best tool for the elimination of sexual harassment."). As Congress amended Title VII in the Civil Rights Act of 1991 to permit victims to collect compensatory and punitive damages, *see Williams v. Banning*, 72 F.3d 552, 553 (7th Cir.1995); *cf. Dockter v. Rudolf Wolff Futures, Inc.*, 913 F.2d 456, 461 (7th Cir.1990), liability now serves to compensate victims of harassment as well. Yet the goal of ensuring equal employment opportunities for both men and women dictates that deterrence be the foremost objective.

I.

A.

With this premise as my starting point, I turn first to a discussion of the appropriate standard for employer liability in instances of *quid pro quo* harassment. *Quid pro quo* harassment occurs where "submission to sexual demands is made a condition of tangible employment benefits." *Dockter*, 913 F.2d at 461; *see also Nichols v. Frank*, 42 F.3d 503, 511 (9th Cir.1994) (*quid pro quo* occurs where supervisor "conditions a job, a job benefit, or the absence of a job detriment, upon an employee's acceptance of sexual conduct"). Pre-*Meritor*, we held in *Horn v. Duke*, 755 F.2d 599, 603 (7th Cir.1985), that employers were strictly liable for *quid pro quo* harassment perpetrated by their supervisory

employees. Our holding in *Horn* was premised in part on agency law, *see id.* at 605, but was prior to *Meritor*'s explicit directive. Until the panel decision in *Ellerth*, this court had yet to revisit our holding more fully guided by agency principles. *See Baskerville v. Culligan Int'l Co.*, 50 F.3d 428, 431-32 (7th Cir.1995). In the period since *Meritor*, seven other circuits have stated that an employer should be held vicariously liable for a supervisor's *quid pro quo* harassment under agency principles. *See Davis v. City of Sioux City*, 115 F.3d 1365, 1997 WL 329583, at * 2 (8th Cir. June 18, 1997); *Nichols*, 42 F.3d at 513-14 (9th Cir.1994) (collecting cases); *Bouton v. BMW of N. Am., Inc.*, 29 F.3d 103, 106-07 (3d Cir.1994); *Karibian v. Columbia Univ.*, 14 F.3d 773, 777 (2d Cir.), *cert. denied*, 512 U.S. 1213, 114 S.Ct. 2693, 129 L.Ed.2d 824 (1994); *Sauers v. Salt Lake County*, 1 F.3d 1122, 1127 (10th Cir.1993); *Kauffman v. Allied Signal, Inc.*, 970 F.2d 178, 185-86 (6th Cir.), *cert. denied*, 506 U.S. 1041, 113 S.Ct. 831, 121 L.Ed.2d 701 (1992); *Steele v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311, 1316 (11th Cir.1989).[2] I believe this circuit should follow suit.

Agency law supports the imposition of vicarious liability upon employers for supervisory *quid pro quo* harassment. Section 219(a) of the *Restatement* provides that an employer is liable for torts of an employee committed while acting within the scope of his or her employment. We have

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[2] Judge Wood appears to conclude that the Eleventh Circuit's recent en banc opinion in *Faragher v. City of Boca Raton*, 111 F.3d 1530 (11th Cir.1997), abrogates the decision in Steele that employers should be held "strictly liable" for supervisory *quid pro quo* harassment. *See* Wood, p. 178. By my reading, *Faragher* is solely a hostile work environment case and contains no suggestion that *Steele* is or should be overturned. By the same token, I read the Second Circuit in *Karibian* as treating *quid pro quo* harassment and hostile work environment as separate forms of harassment with distinct theories of liability. *Cf.* Wood, p. 178.

previously explained that "[t]he deliberate act of an employee acting within the scope of his authority is the act of the employer, for an employer, at least where it is a corporation, acts only through agents." *Shager v. Upjohn Co.*, 913 F.2d 398, 404 (7th Cir.1990); *see also Lancaster v. Norfolk & Western Ry.*, 773 F.2d 807, 820 (7th Cir.1986), *cert. denied*, 480 U.S. 945, 107 S.Ct. 1602, 94 L.Ed.2d 788 (1987); *Horn*, 755 F.2d at 605. Scope of employment, however, is an amorphous term. While Judge Wood in her examination of the subject would hinge the imposition of liability on "scope of employment" delineated by the "meaningful limitation[s]" of section 228 of the *Restatement*, *see* Wood, p. 186, I harbor reservations whether those limitations are indeed instructive.[3]

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[3] Subsection 228(1) reads,

> (1) Conduct of a servant is within the scope of employment if, but only if:
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> (a) it is the kind he is employed to perform;
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> (b) it occurs substantially within the authorized time and space limits;
>
> (c) it is actuated, at least in part, by a purpose to serve the master, and;
>
> (d) if the force is intentionally used by the servant against another, the use of force is not unexpectable by the master.

I imagine that subsections (a) and (c) would infrequently be of analytical value in a sexual harassment case, for presumably employers are not in the business of harassment, and it is not conceivable that harassment of an employee will serve the interests of an employer. Moreover, the time and space limitation of subsection (b) has very little meaning in the context of supervisory harassment: the supervisor/subordinate dynamic does not magically dissolve when an employee punches out for the day, for the supervisor resumes a position of authority the very next morning. Subsection (d) I had always understood to be applicable in instances where force is part of the job description (*e.g.*, the proverbial bouncer). Subsection (d) may be transferrable to cases of sexual harassment since, as Judge Easterbrook pointed out in oral argument, statistically speaking, every

Section 228 appears to have little relevance in the sexual harassment setting. In my judgment, reliance on the *Restatement* in this instance is the type of formalism that does not get us far in practice.

In instances of discrimination, courts have relied upon the concept of delegated authority to flush out the term "scope of employment." (Agency purists may choose to recognize "delegated authority" as a wholly alternative theory.) When a supervisor wields the authority actually delegated to him to dole out job benefits and detriments in order to condition such employment consequences upon receipt of sexual favors, "the supervisor, by definition, acts as the company." *Steele*, 867 F.2d at 1316; *see also Kotcher v. Rosa and Sullivan Appliance Ctr., Inc.*, 957 F.2d 59, 62 (2d Cir.1992) ("[T]he supervisor is deemed to act on behalf of the employer when making decisions that affect the [job benefits] of the employee. From the perspective of the employee, the supervisor and the employer merge into a single entity."); *Bouton*, 29 F.3d at 106-07 ("Scope of employment liability is often invoked in *quid pro quo* cases because the supervisor has used his authority over the employee's job to extort sexual favors"); *Nichols*, 42 F.3d at 514 ("A harasser is able to grant such job benefits or detriments only because he has . . . authority to do so 'delegated to him by his employer' . . . .") (internal citations omitted). It is my belief that liability for sexual harassment

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employer should anticipate harassment. I cannot envision, however, if given the universality of this expectation, how this subsection functions as a "meaningful limitation." In sum, I am unable to conclude how subsection 228 can be applied with great utility to the bulk of sexual harassment litigation. Nor am I concerned (nor do I seek to make any prediction) that liability will be avoided if the court were to follow Judge Wood's analysis, as has been charged, *see* Wood, p. 187. I simply am of the view that a command to circumscribe liability through subsection 228 would leave the district courts without sufficient guidance.

should stem from the delegation of authority which can be used to harass.[4]

Although we did not formally adopt this "delegated authority" justification in *Horn*, we recognized and explained the argument:

> [B]y delegating power to [a supervisor], the "employer" and [the supervisor] essentially merged; as long as the tort complained of was caused by the exercise of this supervisory power, [the supervisor] should be deemed as acting within the scope of his employment, and the employer should be held liable for the tort.

755 F.2d at 605. We have also noted the argument approvingly in several post-*Meritor* cases, including *Shager*, where we explained that "a supervisory employee who fires a subordinate is doing the kind of thing that he is authorized to do, and the wrongful intent with which he does it does not carry his behavior so far beyond the orbit of his responsibilities as to excuse the employer." 913 F.2d at 405; *see also Hunter v. Allis-Chalmers Corp. Engine Div.*, 797 F.2d 1417, 1422 (7th Cir.1986). In sum, because a supervisor would be unable to engage in *quid pro quo* harassment without the authority and power furnished by the employer, the supervisor's conduct is properly imputed to the employer. *See Bouton*, 29 F.2d at 107; *see also Meritor*, 477 U.S. at 70-71 (outlining position of EEOC: "where a supervisor

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[4] Judge Wood argues that a supervisor can harass just as an offensive co-worker might. Wood, p. 173. In my view, a supervisor, by virtue of his position in a hierarchy, always possesses a degree of leverage over a supervisee that does not vary with the nature of harassment. This difference in approach informs my view that a "delegated authority" rationale has more relevance to our analysis of supervisory harassment than the less precise "scope of authority." Moreover, this distinction might gain added significance in the context of co-worker harassment cases.

exercises the authority actually delegated to him by his employer, by making or threatening to make decisions affecting the employment status of his subordinates, such actions are properly imputed to the employer whose delegation of authority empowered the supervisor to undertake them").

These precedential statements and the *Restatement* answer only the question of whether agency law supports the imposition of vicarious liability. The question remains whether the imposition of liability on the employer for *quid pro quo* harassment serves Title VII's goal of deterring sexual harassment. Implicit in this question is whether a negligence standard better serves the objective of deterrence. The imposition of liability beyond that which is likely to deter sexual harassment serves no constructive purpose and unnecessarily imposes costs on employers, costs that are ultimately passed on.

In choosing an appropriate standard of liability, we must ask what it is that we expect employers to do in preventing their employees from engaging in harassment. If courts expect only that companies, once made aware of harassment, will take appropriate remedial measures, negligence would appear the appropriate standard. A negligence standard, which asks whether an employer knew or should have known about an employee's acts of harassment and failed to take appropriate remedial action, *see Baskerville*, 50 F.3d at 432; *Juarez v. Ameritech Mobile Communications, Inc.*, 957 F.2d 317, 320 (7th Cir.1992); *Guess v. Bethlehem Steel Co.*, 913 F.2d 463, 465 (7th Cir.1990), necessarily focuses on the steps that employers should take in detecting and subsequently correcting harassment. Underlying a negligence theory is the assumption that employers should not be liable for harassment that they could not be expected to detect. Pursuant to a negligence standard for supervisory harassment,

we would presumably require a posted anti-sexual harassment policy, a grievance procedure that allows a complainant to circumvent the supervisory chain of command, and prompt remedial action. *See Baskerville*, 50 F.3d at 432 (discussing "reasonable" company actions in co-worker harassment situation); *see also Meritor*, 477 U.S. at 72-73 (existence of discrimination policy and grievance procedure "relevant" to negligence analysis, but not "necessarily dispositive"). Liability would ensue where the policy or process was inadequate or the handling of an identified harasser was deficient. Regrettably, inherent in this scheme is that an harasser will always possess the opportunity to make at least one *quid pro quo* demand before an employer would incur liability.

While posted policies and grievance procedures are important, I believe that the remedial goals of Title VII demand more. Companies' efforts to deal with sexual harassment should be systemic and proactive, rather than discrete and reactive. We know that companies can implement grievance procedures and discipline wayward employees; but we also know that companies can hire, train, and promote employees with an eye toward preventing undesirable behavior. In the abstract, a negligence standard conceivably could account for a company's systemic efforts to promote a workplace free of sexual harassment. Employers who had not done enough to reduce the likelihood of harassment throughout the workplace would be found negligent, even if they had no notice that a specific employee was a harasser. In reality, a negligence standard tends to focus on a company's response to specific instances of harassment. Yet a company's reasonable response to a known harasser is not necessarily indicative of reasonable efforts to prevent harassment from occurring in the first place. By refusing to allow companies to escape liability,

even in the first instance of supervisory *quid pro quo* harassment, we better serve the goal of deterrence.[5]

Chief Judge Posner warns that if the costs of preventing harassment exceed the harm of the harassment (measured in terms of the harassed employees' recoveries), companies will prefer to pay the occasional judgment rather than to take what he views as unreasonable measures to reform the workplace. *See* Posner, p. 45. This is an important point, for it suggests that there may be limits beyond which a judicially-fashioned rule, despite its good intentions, will have no power to prevent the discriminatory behavior that Title VII is designed to eradicate. I believe, however, that this concern is premised on an overly pessimistic view of companies' ability to influence the working environment. *Cf.* Coffey, p. 124. Companies have available a variety of measures—short of installing video surveillance cameras—through which they can both monitor and impact behavior patterns in the workplace. The costs of preventing future harassment essentially represent an investment in long-term freedom from liability. A company faced with recurring liability for harassment perpetrated by its supervisory employees will have an incentive to foster a culture in which harassment is not tolerated.

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[5] The EEOC's "Guidelines on Discrimination Because of Sex" recommend:

> An employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under Title VII, and developing methods to sensitize all concerned.

29 C.F.R. § 1604.11(f).

B.

Defining an actionable *quid pro quo*, of course, is central to the liability standard. A minority of this court is of the opinion, as was the district court in *Jansen*, that an adverse job consequence is necessary to succeed on a *quid pro quo* claim (this idea takes the guise of "company act" in Chief Judge Posner's opinion). *See* Posner pp. 49-53; Manion, pp. 154-57; Kanne, p. 32. Thus, where the employee submits, or the supervisor turns out to have bluffed, or the harassment is reported before any follow-through on the *quid pro quo* threat, there is no cause of action under a *quid pro quo* theory. I cannot agree: a clear and serious *quid pro quo* threat alters the "terms and conditions" of employment in such a way as to violate Title VII and therefore can constitute an actionable claim even if the threat remains unfulfilled.

Principles of agency law support this construction. Making a clear and unambiguous threat of an adverse job consequence is an exercise of the supervisor's delegated authority, just as actually inflicting the consequence invokes that authority. Included in the supervisor's delegated power to hire, fire, promote, evaluate is the authority to threaten to use that power if certain conditions or requirements are not satisfied. For example, no one would question that a supervisor was exercising the authority entrusted to him if he informed an employee that the employee would be fired if his work did not improve. Thus, a supervisor's *quid pro quo* threat, i.e., a threat that clearly conditions concrete job benefits or detriments on compliance with sexual demands, can be imputed to the employer for purposes of liability. This

position has a toehold in the case law.[6] *Cf.* Posner, p. 51 (citing cases requiring adverse job consequence). It should be noted, that many of the cases stating that an adverse job consequence is an element of a sexual harassment claim were decided prior to the 1991 amendments to the Civil Rights Act, when only equitable relief was available. *See, e.g., Chamberlain v. 101 Realty, Inc.*, 915 F.2d 777, 783 (1st Cir.1990); *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1414 (10th Cir.1987); *Highlander v. K.F.C. Nat'l Mgmt. Co.*, 805 F.2d 644, 648 (6th Cir.1986). In that context, it arguably made sense to require some realized adverse action. Now that emotional damage is compensable, the scope of quid pro quo should encompass clear unfulfilled threats that cause serious emotional harm.

This construction of an actionable *quid pro quo* serves Title VII's goal of deterrence as well. If the aim is to guard against sexual harassment, there is no justification for distinguishing between those cases in which a supervisor carries through on his threats from those cases in which the employee either submits to the supervisor's demands or in which the supervisor does not act upon his threats. Liability in this situation serves the goal of preventing such abuse from occurring by creating incentives for companies to take steps

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[6] Courts have described a valid *quid pro quo* claim in terms that could encompass a situation based on threats only. *See, e.g., Nichols*, 42 F.3d at 513 ("[W]e conclude that a supervisor's intertwining of a request for the performance of sexual favors with a discussion of actual or potential job benefits or detriments in a single conversation constitutes *quid pro quo* sexual harassment."); *Karibian*, 14 F.3d at 778 (2d Cir.) ("The relevant inquiry in a *quid pro quo* case is whether the supervisor has linked tangible job benefits to the acceptance or rejection of sexual advances."); *Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554, 1559 (11th Cir.1987) (by "making or threatening to make decisions affecting the employment status of his subordinates," supervisor subjects his employer to strict liability).

in hiring and training their supervisors. And while compensation of the victim may be secondary in overall importance to the goal of deterrence, it is undeniable that an employee can be harmed by an unfulfilled *quid pro quo*. A supervisor's unambiguous communication that adverse job action is imminent if sexual favors are not forthcoming causes the employee real emotional strife. An employee who does not submit may well undergo anxiety, distress, and loss of productivity regardless of whether the threat is carried out. Further, holding employers responsible for threats that clearly condition tangible job benefits upon the receipt of sexual favors and result in injury, even if no adverse job consequences follow, is consistent with the fact that the employee who submits to such a threat is afforded a remedy. *See, e.g., Nichols*, 42 F.3d 503; *Karibian*, 14 F.3d 773. Employees who have the wherewithal to call the supervisor's "bluff" and suffer emotionally as a consequence should not have to go uncompensated, nor should a "bluff" so likely to cause harm go unrecognized by the law. The potential to succeed against a company on a claim of such an abuse of power is no "windfall."

That said, and cabined by *Meritor*'s directive, we must recognize an exception to the rule of vicarious liability for unambiguous *quid pro quo* threats: no liability should result where a victim or plaintiff could not have reasonably believed that it was within the supervisor's power to affect the conditions of the plaintiff's job. As explained above, where the supervisor is using his actual delegated authority, liability may be imposed on the company. An employer may also be held liable where a supervisor's *quid pro quo* threat exceeds his actual authority, but the victim reasonably relies on the

supervisor's threat because of his apparent authority.[7] *See Restatement* § 219(2)(d). Apparent authority, appropriately described by Judge Wood as "the shadow of actual authority," *see* Wood, p. 190, exists only "to the extent that it is reasonable for the third person dealing with the agent to believe that the agent is authorized," and the third person actually believes the agent to be authorized. *Restatement* § 8 cmt. c. Thus, only where it would be reasonable for a victim of harassment to believe that the authority used to harass had been delegated to the supervisor would liability ensue.

II.

I now turn to the employer's liability for a supervisor's creation of a hostile work environment. The Supreme Court has held that Title VII offers protection for a hostile work environment, defined as a workplace "permeated with 'discriminatory intimidation, ridicule, and insult' . . . that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.' " *Harris*, 114 S.Ct. at 370 (quoting *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 63, 67 (1986)). Traditionally, plaintiffs alleging and courts assessing sexual harassment have differentiated between *quid pro quo* and hostile work environment claims. *See Meritor*, 477 U.S. at

[7] As there may exist the potential for some misread of this issue, *see* Coffey p. 129 n.37; Manion, pp. 160-64, I want to underscore that my focus is not any apparent authority to harass, which would be an anomaly to say the least, but the apparent authority to alter the terms and conditions of the workplace that makes harassment possible.

65;[8] *Dockter*, 913 F.2d at 458. It could be argued that no principled distinction can be drawn between the two types of harassment in cases where the harassment is perpetrated by a supervisor. In either instance, the supervisor may use the authority delegated to him to harass, for, as Justice Marshall observed in his *Meritor* concurrence, "[a] supervisor's responsibilities do not begin and end with the power to hire, fire, and discipline employees, or with the power to recommend such actions. Rather, a supervisor is charged with the day-to-day supervision of the work environment and with ensuring a safe, productive workplace." 477 U.S. at 76. A minority of this court takes this position and treats sexual harassment under a unified approach informed by the *Restatement*. *See* Wood, pp. 172-78.

I believe sound reasons exist to distinguish between liability standards for *quid pro quo* and hostile work

[8] In explaining the EEOC's definition of hostile work environment, the Supreme Court distinguishes hostile work environment from quid pro quo harassment. *See Meritor*, 477 U.S. at 65. Judge Wood argues that the Supreme Court did not make this distinction in its discussion of employer liability. *See* Wood, p. 176. In *Meritor* such a distinction or clarification would not have been necessary as *Meritor* was resolved as a hostile work environment case. Judge Wood asserts that *Meritor* involved allegations of *quid pro quo* sexual harassment. While I am unable to locate these allegations in the Court's opinion, the original complaint may well have contained such allegations, though no reference to the same are found in the district court opinion. *See Vinson v. Taylor*, No. 78-1793, 1980 WL 100 (D.D.C. Feb.26, 1980). Moreover, the district court found that the plaintiff "was not required to grant Taylor or any other member of Capital sexual favors as a condition of either her employment or in order to obtain a promotion." *Id.* at *7. Thereafter the Court of Appeals considered only the plaintiff's argument under a theory of hostile work environment, *see Vinson v. Taylor*, 753 F.2d 141, 144-46 (D.C.Cir.1985), as did the Supreme Court. *See also Cudahy* p. 29.

environment harassment.[9] My conclusion that harassment of the *quid pro quo* variety should give rise to employer liability is premised on the belief that companies can effectively communicate to their employees the message that such behavior will not be tolerated. Yet when it comes to the hostile work environment, the courts have been hard pressed even to define the phrase. *See Harris*, 114 S.Ct. at 372 (Scalia, J., concurring) (" 'Abusive' (or 'hostile,' which in this context I take to mean the same thing) does not seem to me a very clear standard—and I do not think clarity is at all increased by adding the adverb 'objectively' or by appealing to a 'reasonable person's' notion of what the vague word means."); *see also id.* at 371 (opinion of the court) ("This is not, and by its nature cannot be, a mathematically precise test . . . but we can say that whether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances."); *Baskerville*, 50 F.3d at 430 ("It is not a bright line, obviously, this line between a merely unpleasant working environment on the one hand and a hostile or deeply repugnant one on the other."); *Nichols*, 42 F.3d 503, 510 (9th Cir.1994) ("Questions relating to love and sex are among the most difficult for society to answer—in or out of the workplace—and courts are hardly experts in the realm. Still, we must find ways to define sexual harassment."). Given this definitional difficulty, as well as the variety of views in society as to what constitutes abusiveness, *see Nichols*, 42 F.3d at 510, I have less confidence in employers' abilities to

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[9] Bifurcation of a complaint in this manner in no way suggests that harassment will always take the form of either hostile work environment or *quid pro quo* harassment. *See* Wood, p. 172. Courts have simply created a mechanism for pleading a case. When faced with a situation such as the instant suits, a plaintiff may plead both theories. Trial courts, recognizing the artificial nature of the distinction, should be liberal in construing EEOC complaints. *See* Wood, pp. 198-99.

communicate a consistent message to their employees regarding what constitutes a hostile work environment. Further, it may not be possible for employers to take the measures necessary to eradicate all arguably offensive conduct from the workplace. Because " 'abusiveness' is to be the test of whether legal harm has been suffered, opening more expansive vistas of litigation," *Harris*, 114 S.Ct. at 372 (Scalia, J., concurring), I believe that a more judicious approach is called for when it comes to imposing vicarious liability in hostile work environment cases.

While agency principles may not "limit" the imposition of a stronger standard of liability in the context of a supervisory hostile work environment, *see* Wood, p. 186,[10] we should not lose sight of the purpose of imposing liability on supervisors: deterrence. Because a hostile work environment is difficult to define, employers may be unable to send an unambiguous message to employees. I believe the appropriate inquiry in dealing with this conduct remains whether the company has taken due care to prevent harassment and to respond to complaints of harassment. Traditionally, courts have viewed negligence as a close approximation of what the prevention of harm should cost to the company. *See United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir.1947) (Learned Hand's famous test); see also *McCarty v. Pheasant Run, Inc.*, 826 F.2d 554 (7th Cir.1987) (collecting cases). By its conception, negligence possesses the flexibility to respond by degree to amorphous or variable harms, such as this one.

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[10] Judge Wood, with a broad interpretation of scope of employment, envisions vicarious liability for behavior which would traditionally fall under the rubric of hostile work environment. My view of agency principles, informed by the concept of delegated authority, is not as expansive a basis on which to ground vicarious liability for hostile work environment harassment.

We observed in *Carr v. Allison Gas Turbine*, "the greater the [sexual] harassment—the more protracted or egregious, as distinct from isolated . . . or ambiguous, it is—the likelier is the employer to know about it or to be blameworthy for failing to discover it." 32 F.3d 1007, 1009 (internal citations omitted). Given courts' definitional uncertainty, the cumulative nature of such harassment, and my unwillingness to unfairly penalize an employer, it is best to let the standard of liability remain at negligence.

Further, a negligence standard dovetails with the Supreme Court's construction of hostile environment as "severe and pervasive," so that, in theory, a harassed employee will not be left without a remedy against a complicit company. In the overwhelming majority of cases, a plaintiff will have no cause of action until, at a minimum, two instances of harassment have accrued. If we assume prompt reporting (*i.e.*, reporting at initial stages of harassment),[11] employer liability will be triggered by the very creation of the hostile environment, as the employer will have allowed the harassment to reach the level of "severe and pervasive." As explained above, the law should not tolerate "one free" *quid pro quo* demand. Similarly, the law should not exhibit patience with an employer that permits harassment, once reported, to reach the point where it creates a hostile work environment.

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[11] I believe we must assume prompt reporting. A negligence standard will encourage companies to publicize sexual harassment policies and provide effective grievance procedures. If the culture is such that there is some hindrance to reporting, it will be a factor considered by the courts in determining negligence. Perhaps placing the burden of reporting on the harassed employee and making public this burden through the dissemination of policies will foster an atmosphere where victims of harassment will be more ready to realize their rights. *Cf.* Cudahy, p. 30.

This is not to say that we should ignore the reality that when the authority wielded by supervisors over subordinates is used to create a hostile environment, employees may be less likely to report such harassment. While the appropriate standard for both supervisor and co-worker hostile work environment harassment is negligence, I agree with Chief Judge Posner, *see* Posner, p. 46, that what constitutes due care may not be the same in both cases. Because employers entrust supervisors with authority over other employees who may be abused, harassment by a supervisor is more likely to affect the "terms and conditions of employment." A heightened duty of care should apply both in terms of the machinery available to employees to complain of harassment and in terms of a company's duty to investigate and respond effectively to such complaints. *See Meritor*, 477 U.S. at 73 (grievance procedure flawed because it required reporting to supervisor); *cf. Carr v. Allison Gas Turbine*, 32 F.2d 1007, 1009 (7th Cir.1994) ("It would be unrealistic to expect management to be aware of every impropriety committed by every low-level employee.").[12] This intensified concern for supervisory abuse is implicit in the concept of negligence and in the Supreme Court's multi-factor approach, *see Harris Forklift*, 114 S.Ct. at 371; it is manifest in the Supreme

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[12] Judge Coffey, Judge Manion, and Judge Wood express concern that employers will be "baffled" by this heightened duty of care. *See* Coffey, p. 89, Manion, p. 151, Wood, p. 189. I believe that this heightened duty has been present in courts' approach to supervisory sexual harassment as the supervisory relationship has been for some time a focal point of our concern; it should therefore pose no confusion to employers. Moreover, employers should regularly rethink their responsibility for and approach to the supervisory work environment. If this heightened duty does indeed cause employers pause, I expect it to produce more innovative and thoughtful approaches to this problem from them. I would add that my approach to negligence is in accord with Chief Judge Posner's, joined by Judge Coffey and Judge Manion in this respect.

Court's reaction to Meritor's grievance procedure. Conscious of the power dynamic between supervisor and supervisee and eager for the realization of Title VII's goal, I stress it here.

III.

I conclude with an application of my suggested approach to the facts of these cases, the elaboration of which I leave to the *per curiam* opinion, Chief Judge Posner, see Posner, pp. 53-57, Judge Coffey, *see* Coffey pp. 126-37, and Judge Wood, see Wood, pp. 190-98. Under the standards set forth above, Jansen has created genuine issues of material fact as to whether she was subjected to *quid pro quo* harassment. Although it is by no means a foregone conclusion, a reasonable jury could find that by telling Jansen, "I haven't forgotten your review, it's on my desk," while at the same time patting his crotch, Antoni was conditioning a favorable performance review, and thus a raise, on Jansen's submission to his sexual desires. Because this alleged exchange could constitute a meaningful threat, and there is no evidence as yet that Jansen did not view the threat as real, a reasonable jury could conclude that Jansen was subjected to compensable *quid pro quo* harassment.

Jansen has also shown enough to get before a jury on her hostile work environment claim. Antoni allegedly subjected Jansen to months of sexually suggestive remarks and inappropriate acts and gestures, that could be considered "severe and pervasive." There is evidence in the record that PCA should have been aware of Antoni's campaign of abuse. While Jansen did not complain through official channels initially, she did complain to fellow employees. PCA was on notice that Antoni had allegedly harassed his two previous secretaries. Further, there is evidence that Jansen, like the two previous secretaries, was unaware of any sexual harassment policy at PCA. A reasonable jury, deliberating

under the heightened standard of care applicable in the supervisory context, could find PCA liable.

Ellerth, like Jansen, has put forward sufficient evidence to survive summary judgment on her claim of *quid pro quo* harassment. Her pleadings submitted to the district court, specifically her motion opposing summary judgment together with its accompanying affidavits, while unartful, plainly articulate a basis for a quid pro quo claim. *Cf. Saxton v. American Tel. & Tel. Co.*, 10 F.3d 526, 533 (7th Cir.1993). This basis is comprised of the following alleged statements made by Slowick to Ellerth. While in the lounge of a hotel where Ellerth had come at Slowick's request during a business trip, after an evening of allegedly ogling Ellerth, Slowick said, "you know, Kim, I could make your life very hard or very easy at Burlington." In a later phone conversation, when Ellerth asked permission to undertake a special project, he said, "I don't have time for you right now, Kim, unless you tell me what you're wearing." In a subsequent telephone conversation, Slowick denied her request and then asked her if she were wearing shorter skirts, as that would make her job "a whole heck of a lot easier." Slowick, at an interview regarding Ellerth's promotion during which he rubbed Ellerth's knee, said he had hesitations about promoting her because she was not "loose enough for him."[13] From these essentially uncontested statements, a reasonable jury could conclude that Slowick was conditioning or threatening to base "the terms and conditions" of Ellerth's employment on Ellerth's catering to Slowick's sexual desires, and thus subjected to her compensable *quid pro quo* harassment.

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[13] I note Ellerth was subsequently promoted.

Ellerth, while perhaps having shown enough to get before a jury on her hostile work environment claim, has waived the right to do so. Before the original panel, Ellerth argued that liability should be imposed for hostile work environment because Slowick "was aided in accomplishing the tort by the existence of an agency relationship." *See Restatement* § 219(2)(d). This argument alone would not prevent recovery under an alternate theory. *See* 5 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1219 (1990) (theory of the pleading doctrine). Perhaps overly ambitious, however, Ellerth goes farther in her reply brief for the argument *en banc* and disavows any argument that liability should be imposed because of employer negligence. *See Restatement* § 219(2)(b). As I believe liability remains linked to negligence, I join Chief Judge Posner in his assessment that Ellerth has no remedy here. *See* Posner, p. 57.

CUDAHY, *Circuit Judge*, concurring. I participated in this *en banc* rehearing as a member of the panel that originally heard *Jansen* (with Judges Coffey and Flaum). Hence, my participation is limited to that case.

I join Judge Flaum's concurring opinion, and I write primarily to elaborate on what constitutes an appropriately "heightened" duty of care for employers whose supervisors engage in hostile environment harassment. For, as Judge Flaum indicates, there are good reasons for a heightened standard for supervisor misconduct in contrast to the same misconduct by fellow employees.

It may be that Judge Wood's analysis converges with Judge Flaum's on the bottom line. Judge Wood mentions circumstances in which supervisors may exceed the scope of their employment and therefore act without delegated authority. *See* Wood, pp. 188-89. In his negligence analysis Judge Flaum calls for a heightened standard of employer care. *See* Flaum, p. 25; *see also* Posner, pp. 46-7. I doubt that the result in Jansen, for example, would differ under one or the other of these approaches. Nevertheless, it is necessary to distinguish *quid pro quo* from hostile environment claims. The Supreme Court distinguished them in *Meritor* with an implication, at least, that they might better be treated differently. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 72, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986). Justice Marshall, concurring in the judgment in *Meritor*, read the majority opinion this way and objected to "a special rule, to be applied only in 'hostile environment' cases." *Id.* at 77 (Marshall, J., concurring in the result). But the opposite view seemingly prevailed, and we must take our guidance from that fact. The other circuits have taken this lead. *See, e.g.*, *Faragher v. City of Boca Raton*, 111 F.3d 1530 (11th Cir.1997) (en banc); *Nichols v. Frank*, 42 F.3d 503 (9th Cir.1994); *Bouton v. BMW of N. Am., Inc.*, 29 F.3d 103 (3d Cir.1994); *Kauffman v.*

Allied Signal, Inc., Autolite Div., 970 F.2d 178 (6th Cir.1992); *but cf.*, *Karibian v. Columbia Univ.*, 14 F.3d 773 (2d Cir.1994).

That the Supreme Court distinguished the two kinds of harassment claims makes sense. In a *quid pro quo* situation, a supervisor acts with actual or apparent authority when he promises employment goodies or threatens their withdrawal to extract sexual "cooperation." *Quid pro quo* is always a creature of power. It is the classic paradigm of powerful males forcing their wills on vulnerable females. A hostile environment, on the other hand, can be created by persons of equal, or even inferior, status to the victim. Supervisory rank may facilitate it, and power may enhance it, but neither is essential, or even central, to the creation of a hostile environment.

In *Jansen*, the supervisor Antoni allegedly created a hostile environment. Power is not of the essence there, as it certainly is for *quid pro quo* harassment. One can imagine a lesser figure doing almost the same thing as Antoni. But his rank in the company was of considerable help to him in creating a milieu of abuse. It is not easy to articulate exactly how a supervisor's abusive conversation and posturing implicates his authority. Still, the intuition remains that the delegated power certainly helps—just as it helped Antoni. Just as it is the centrality of power and authority that dictates strict liability for *quid pro quo* harassment, it is the shadow of power and authority that dictates a heightened negligence standard for supervisory hostile environment harassment.

The negligence standard used to govern hostile or abusive environment claims involving a supervisor must be negligence as related to a special and demanding duty of care. The standard of care should be somewhat like that imposed on packers of parachutes or open heart surgeons. *See* W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF

TORTS § 38, at 208-9 (5th ed.1984); *see also*, e.g., *Rustay v. Consol. Rail Corp.*, 775 F.Supp. 161, 163-65 (D.N.J.1991) (operating railroad requires greater duty of care). Judge Flaum has pointed out a weak link in a negligence approach: the assumption that a system can be built under which victims of supervisory sexual harassment will feel free to report the problem to the company. *See* Flaum, pp. 24-5. There ought to be a presumption that in the reporting system under examination, victims could not reasonably be expected to report their problems (unless, of course, the victim actually did). The employer would have an opportunity to overcome this presumption. But, if no evidence were presented, the presumption would import liability.

Also, under the negligence standard, one of the principal liability issues is whether the employer had actual or constructive notice of the creation of a hostile environment by a supervisor. In *Faragher v. City of Boca Raton*, 864 F.Supp. 1552, 1563 (S.D.Fl.1994), the district court held that, if a situation in the company were sufficiently severe to amount to a hostile environment, it was by the same token sufficiently visible to put the employer on constructive notice. In general, this approach has merit. *See Meritor*, 477 U.S. at 72 (citing with approval *Taylor v. Jones*, 653 F.2d 1193, 1197-99 (8th Cir.1981) (holding employer liable for racially hostile working environment based on constructive knowledge)). I would create a rebuttable presumption that, if a situation attributable to a supervisor is severe enough to create a hostile environment, the employer is on constructive notice that remedial measures are required. The employer, of course, could offer evidence to the contrary.

These two presumptions give concrete meaning to Judge Flaum's call for a heightened duty of care. As I noted at the outset, this view might lead to verdicts not too different from Judge Wood's approach. These presumptions, however,

would respect and reward prudent employers who (1) provide a genuinely protected channel for reporting harassment and (2) remain in close touch with the possibility of harassment by supervisors in their own organizations. The diligent employer will have an opportunity to adduce evidence to this effect and thereby to escape liability.

KANNE, *Circuit Judge*, concurring. I join Judge Flaum's thoughtful opinion—except for reservations in two areas. First, with regard to *quid pro quo* harassment, I do not think an employer should be held strictly liable for mere threats made by a supervisory employee. I agree that our focus should be on deterring sexual harassment, but I believe a negligence standard will adequately do the job. A negligence standard will serve to deter *quid pro quo* threats because employers will rationally seek to avoid liability 1) by establishing policies and procedures to circumscribe improper conduct by supervisors, and 2) by imposing appropriate sanctions against errant supervisors once notified by an employee that a supervisor has made a *quid pro quo* threat. Beyond that, there is not much an employer realistically can do to put a stop to *quid pro quo* threats that do not result in any adverse job consequence. Imposing strict liability for such threats would therefore yield little (if any) greater deterrence and generate significantly greater litigation costs than a negligence standard. Moreover, *quid pro quo* threats may be ambiguous, and if such threats make an employer strictly liable, plaintiffs will attempt to turn all instances of supervisor sexual harassment into "implied threats" in order to take advantage of strict liability's easier burden of proof.

On the other hand, I cannot agree with Chief Judge Posner's position that in her threat-only situation (*i.e.*, without an adverse job consequence) Jansen does not have a viable *quid pro quo* claim. Although strict liability is inappropriate for quid pro quo threats, Jansen should still be able to win on her *quid pro quo* theory if she can prove her employer's negligence in failing to obviate *quid pro quo* threats. *Quid pro quo* claims involving only threats deserve scrutiny for employer negligence because of the qualitatively more oppressive nature of *quid pro quo* harassment. Perhaps the facts here will demonstrate that the employer was not

negligent, but Jansen's *quid pro quo* claim should be remanded along with her hostile environment claim so the district court can make the negligence determinations. Admittedly, in this and many cases involving mere threats, adding a *quid pro quo* claim to a hostile environment claim may not make much practical difference because the supervisor's threat will already be relevant to the hostile environment negligence analysis. In some cases, however, the *quid pro quo* claim will stand alone, and negligent employers should be liable for such *quid pro quo* threats.

My second reservation regarding Judge Flaum's opinion concerns his treatment of hostile environment harassment. I cannot agree with Judge Flaum's language suggesting that employers are under a "heightened duty of care" for instances of supervisor harassment. A negligence standard always entails a fact-specific inquiry regarding what care the parties reasonably should have taken. The training, authority, and control given supervisors by an employer will therefore always enter the negligence equation. Calling this a "heightened duty of care" may suggest to some that employers should be presumed liable for supervisor hostile environment harassment. I cannot endorse any such presumptions that take this type of case outside the normal rules of negligence and further complicate this increasingly difficult issue.

POSNER, *Chief Judge*, joined by MANION, *Circuit Judge*, concurring and dissenting. These cases present the court with difficult and important questions concerning the application of Title VII of the Civil Rights Act of 1964 to sexual harassment by supervisory employees. I agree with the basic approach to these questions, and most of the specific answers to them, in Judge Flaum's concurring opinion. Our most substantial difference concerns the employer's liability, in "quid pro quo" sexual harassment cases, for what I shall call "noncompany acts"; these are illustrated by a supervisor's threat that is not followed up by termination, demotion, or other acts that change the contractual relation between the victimized employee and the employer. I shall explain this difference between us after setting forth a general approach that differs somewhat from his.

When the Supreme Court in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 72, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986), said that "Congress wanted courts to look to agency principles" to determine the liability of employers sued under Title VII for sexual harassment of one employee by another, the Court was not ruling that Title VII incorporates the American Law Institute's *Restatement of Agency*. Obvious as this point should be to any reader of the Supreme Court's opinion—for the opinion states that "common-law [agency] principles may not be transferable in all their particulars to Title VII," 477 U.S. at 72—it hasn't sunk in all the way. One of the briefs in the cases before us actually states, "Since Congress placed a comma after the first clause of § 219(2)(d) [of the *Restatement*]. . . ." The courts do not make this mistake; but the *Restatement* has become their template for analyzing the issue of employers' liability for harassment by supervisors. This is the wrong approach, and I am pleased that Judge Flaum does not follow it.

In saying that it is wrong to rely on the *Restatement*, I do not mean that it is wrong to bring agency principles into the application of Title VII. That is inescapable. Title VII creates a statutory tort of employment discrimination but imposes liability only on the "employer"; what is to count as the employer's discriminatory act, and so warrant a remedy under Title VII, is a question of agency that the federal courts must by default answer as a matter of federal common law. Often courts create a federal common law principle simply by borrowing a part of the law of the state in which the legal dispute arose. That would not be a sound approach here, and a majority of the judges of this court reject it; nor is it the tenor of the Supreme Court's reference in *Meritor* to the judicial role: "Congress wanted courts to look to agency principles." Given that the employer is the only person made liable by the statute, the question of agency is central to its administration, so that to defer to state law could introduce striking geographical disuniformities and indeed would empower a state to nullify Title VII.

It is true that the Supreme Court recently repudiated a comprehensive federal judicial power to create common law, but it was speaking of federal common law in "its strictest sense," *Atherton v. FDIC*, 117 S.Ct. 666, 670, 136 L.Ed.2d 656 (1997), that is, of legal doctrine that could not be construed as interpretive. In *Atherton* it was a standard of care for directors of all financial institutions and had no more warrant than the fact that the institution was federally chartered or insured. Deciding what agency principles shall govern liability under a liability-creating statute such as Title VII is not free-wheeling common-law rulemaking; it is filling a statutory gap, a standard office of interpretation. There is no novelty in formulating federal principles of agency law in interpreting federal statutes that are silent on agency. See, e.g., *Central States Trucking Co. v. J.R. Simplot*

Co., 965 F.2d 431 (7th Cir.1992); *United States v. Balistrieri*, 981 F.2d 916, 930 (7th Cir.1992). I have not found a case which suggests that liability under Title VII should depend on the agency law of the state where the dispute arose. The parties to the cases before us have not suggested that we take such an approach, and Judge Manion's opinion marshals compelling authority against it.

Both cases before us arose in Illinois, but the parties have not enlightened us about the Illinois law of agency. In fact Illinois courts almost always refuse to hold employers liable for the sexual misconduct of their employees, including their supervisory employees. See *Deloney v. Board of Education*, 281 Ill.App.3d 775, 217 Ill.Dec. 123, 666 N.E.2d 792, 797-98 (Ill.App.1996) (truant officer who molested 16-year-old student); *Randi F. v. High Ridge YMCA*, 170 Ill.App.3d 962, 120 Ill.Dec. 784, 524 N.E.2d 966, 970 (Ill.App.1988) (sexual assault by employee of day-care center on 3-year-old); *Webb v. Jewel Cos., Inc.*, 137 Ill.App.3d 1004, 92 Ill.Dec. 598, 485 N.E.2d 409 (Ill.App.1985) (sexual assault by security officer on suspected shoplifter); *Hoover v. University of Chicago Hospitals*, 51 Ill.App.3d 263, 9 Ill.Dec. 414, 366 N.E.2d 925 (Ill.App.1977) (sexual assault by doctor on patient); *Dockter v. Rudolf Wolff Futures, Inc.*, 684 F.Supp. 532, 535-36 (N.D.Ill.1988) (sexual harassment by manager) (interpreting Illinois law), *aff'd*, 913 F.2d 456 (7th Cir.1990). *St. Paul Fire & Marine Ins. Co. v. Downs*, 247 Ill.App.3d 382, 187 Ill.Dec. 130, 617 N.E.2d 338 (Ill.App.1993), found sexual molestation of a patient by a psychiatrist to be arguably within the scope of the psychiatrist's employment, but based this on the patient's psychological dependence on the psychiatrist, distinguishing the other cases that I have cited. *Id.* at 344. *Downs* belongs to the class of cases, illustrated also by sexual molestation by police officers, as in our recent *West v. Waymire*, 114 F.3d 646, 649 (7th Cir.1997), in which

the employer has entrusted the employee with unique power to molest or otherwise oppress subordinates or members of the public; the distinction between these cases and the ordinary case of sexual harassment by a supervisory employee is stressed in *Deloney v. Board of Education*, *supra*, 217 Ill.Dec. 123, 666 N.E.2d at 799 n. 5. In *Deal v. Byford*, 127 Ill.2d 192, 130 Ill.Dec. 200, 537 N.E.2d 267 (Ill.1989), scope of employment was admitted, hence not an issue, and anyway the employee was clearly acting in furtherance of the employer's interests. See *id.* at 270, 272-73. And *Pyne v. Witmer*, 129 Ill.2d 351, 135 Ill.Dec. 557, 543 N.E.2d 1304 (Ill.1989), did not involve an intentional tort.

Green Hills Country Club v. Illinois Human Rights Comm'n, 162 Ill.App.3d 216, 113 Ill.Dec. 216, 514 N.E.2d 1227, 1230 (Ill.App.1987), does hold that an employer is strictly liable for any type of sexual harassment by a supervisory employee, but it bases this holding on an Illinois statute dealing with sexual harassment, 775 ILCS 5/2-102(D), and does not mention the common law of agency. Judge Easterbrook (and Judge Wood by implication) fastens on this statute as the ground for believing that the plaintiffs in our two cases have a good claim, noting the Supreme Court's reference in *Meritor* to the *Restatement of Agency*—though the *Restatement* is limited to common law, *Restatement (Second) of Agency* 3 (1958), so that *Meritor*'s reference to it is not plausibly interpreted as authority for deferring to a state statute. Nor are *Restatements* confined to *state* common law, as my colleague believes. The *Meritor* suit had not been filed in any state, but in the District of Columbia. The Supreme Court neither mentioned this fact nor suggested that the place to look for the agency principles applicable to the case was the law of the District of Columbia. My colleague is right that the "common law of agency has stood the test of time."

But the observation is doubly irrelevant: he forswears reliance on common law principles of agency in favor of a statute that departs from those principles; and they were not, as I shall point out, developed with reference to the novel and atypical tort of sexual harassment.

His argument implies that by a stroke of the pen Illinois could eliminate all Title VII liability in that state that depended on the principles of agency law. This would mean all Title VII liability in which the employer was not a personal participant in the infringement of the employee's rights. A state statute that provided that a decision to fire or take other adverse action against an employee on the basis of her sex would not be imputed to the employer unless the employer's owner or chief executive officer had approved the action would do the trick. My colleague resists this implication, arguing that an attempt by a state to curtail Title VII liability would be preempted by the federal statute. But if as he believes Congress left the formulation of agency principles to the states, there is nothing in Title VII that could conflict with a state's decision to adopt the narrowest of such principles to govern sexual harassment or other forms of discrimination. He says we needn't fear that states might discriminate against Title VII plaintiffs by formulating narrow agency principles because the principles would apply to claims under state law as well as under federal law. But the state statute on which he relies for the agency principles applicable to Title VII sexual harassment suits filed in Illinois is not a general agency or tort statute; it is limited to discrimination. The logic of his position is that a state hostile to discrimination claims could draft a special, and especially narrow, set of agency principles to govern discrimination cases alone.

Just as I do not think that Title VII's silence with respect to the applicable agency principles points us toward the

incorporation of state law, so I do not think that its silence can tell us anything about the *structure* of those principles. It thus cannot tell us whether, as I believe no one thinks (and the Supreme Court seems in *Meritor* to have nixed, see 477 U.S. at 72), the employer should be strictly liable for all acts of sexual harassment on or off the premises (in Ellerth's case, largely off) by all employees, or whether distinctions should be made on the basis of kinds of employee (such as supervisory or nonsupervisory) or kinds of act (such as demotion versus a sexual solicitation versus forcible rape), or some combination of the two.

The *Second Restatement of Agency* (there is no third) was promulgated 40 years ago, before Title VII was enacted and before the concept of sexual harassment had emerged as a distinct legal concept. There is nary a hint in the text or legislative history of Title VII that Congress intended to incorporate the *Restatement* by reference. It would have been loopy to do so. The *Restatements* are intended to provide a compact statement of common law principles. The essence of the common law method of rulemaking is suppleness and flexibility, facilitating adjustment to altered circumstances, and is inconsistent with treating any statement of common law principles as a petrified text.

The provisions of the *Second Restatement of Agency* are designed mainly for two types of case neither of which is before us. The first is the tort committed against a stranger, as where a truck driver employed by the defendant runs down a pedestrian. The second is the contract between a stranger and an agent of the defendant. The *Restatement* does not completely ignore torts committed by one employee against another, see § 473, but it subjects them to the "fellow servant" rule. § 474. This nineteenth-century doctrine excuses the employer from liability for negligent injury of one employee by another. *Farwell v. Boston & Worcester*

R.R., 45 Mass. (4 Met.) 49 (1842). If the absorption of the *Second Restatement of Agency* into Title VII were taken seriously, courts would have to explore the implications of the fellow servant rule for the law of sexual harassment. This they rarely do (but see *Guess v. Bethlehem Steel Corp.*, 913 F.2d 463, 465 (7th Cir.1990)), though, as it happens, the position they have arrived at with respect to harassment by coworkers is consistent with the rule. As I shall note in a moment, an employer is not automatically liable for coworker harassment; there is employer liability only if the employer is negligent.

The fellow servant rule might be thought inapplicable to sexual harassment because the rule is invariably stated in terms of the employee's negligent rather than intentional torts, and sexual harassment is intentional on the part of the harasser, that is, of the fellow employee. But the only reason the rule seems to be just about torts of negligence is that the liability of an employer for his employees' intentional torts is so much more limited than his liability for their unintentional (usually, negligent) torts that the employer would rarely have occasion to invoke the rule other than in the negligence setting. The fellow servant rule was applied to an intentional tort in *Gabrielson v. Waydell*, 135 N.Y. 1, 31 N.E. 969 (N.Y.1892), and while it is an old case, most fellow servant cases are old, the fellow servant rule having largely gone down the drain when employers' liability acts and workmen's compensation acts superseded the common law of employer liability for industrial accidents. See *Pomer v. Schoolman*, 875 F.2d 1262 (7th Cir.1989), for a rare modern case.

If the fellow servant rule were sought to be applied to harassment by a supervisory employee, we would have to decide whether the harasser was a "vice- principal," W. Page Keeton *et al.*, *Prosser and Keeton on the Law of Torts* § 80, p. 572 (5th ed.1984), exercising a nondelegable duty of care,

or merely a "superior . . . servant." *Restatement*, *supra*, § 479. The employer would be liable for the vice-principal's harassment but not the superior servant's. The issue of classification would be made difficult to the point of unreality by the fact that the *Restatement* nowhere addresses sexual harassment of one employee by another, or indeed sexual harassment of any sort. It is impossible to tell from its discussion of nondelegable duties whether the supervisors in our two cases would have been thought vice-principals.

Sexual harassment differs from most other torts, and especially from the most common torts—the deliberate or accidental infliction of physical injury—in being "invisible" or largely so other than to victim and perpetrator. The employer will know whether one of his employees sustains a physical injury on the job; he is much less likely to know that one of his employees is being sexually harassed on the job. The feasibility of an employer's controlling the torts of his employees is, as I shall show, an important consideration in crafting agency principles, and one dependent on the particular tort.

I may be in a minority of judges in not believing (or at least in being willing publicly to deny) that the most fruitful way of approaching a novel issue of law is through seeking analogies in legal doctrines designed with quite other issues in mind. Nevertheless, had the Supreme Court told us to use the *Second Restatement of Agency* as the framework for evaluating sexual harassment under Title VII, I would bow to its command. It did not; but by citing the *Restatement* it gave lawyers and judges a straw to grasp at. The straw has broken in their hand. The *Restatement* turns out to be hopelessly vague in its bearing on the issue of employers' liability for sexual harassment, being vaguely worded and addressed to other issues. So judges can in good faith reach opposite results when they seek guidance in the *Restatement*

to employers' liability for sexual harassment by supervisory employees. See, e.g., *Faragher v. City of Boca Raton*, 111 F.3d 1530 (11th Cir.1997) (en banc). The judges and lawyers who insist that the *Restatement of Agency* is The Way either are disingenuous, wishing to conceal their true grounds of decision, or are in the grip of the formalist belief that difficult cases can be decided by teasing out the meaning of words in a text composed with other problems in mind, without need to examine the social policies that the law might be thought to be serving. "We condemn *Lochner* as formalistic not because it involves a choice, but because it attempts to describe this choice as compulsion." Frederick Schauer, "Formalism," 97 *Yale L.J.* 509, 511-12 (1988). Since neither the text nor the legislative history of Title VII indicates what agency principles the authors of the statute had in mind, the formalist gropes for another text, finds the *Restatement*, and treats it inappropriately as a surrogate statute.

It is time that we threw away the crutch of the *Restatement* and, recognizing the differences between workplace sexual harassment and the actual subject matter of that antiquated screed, ask as an original matter—as I think the Supreme Court invited us to do in *Meritor* when it (under)stated that the common law of agency might not be fully transferable to sexual harassment—what the best regime of liability would be for these cases. It would be misleading even to speak of applying to this case "the law of agency." That would imply the existence of some ready-at-hand body of rules that we have only to apply to a new set of circumstances. The problem is not application; it is creation. I think it equally question-begging to ask whether a supervisor's conduct is "attributable" to the employer, or whether he may be said to "speak for" the employer, or whether an employer must be deemed to "delegate his common law duties" to his

supervisory employees. These are just additional ways of asking whether the employer should be liable.

I understand the attraction of seeking a textual answer elsewhere, perhaps in local law, as Judge Easterbrook suggests; but this evasion of the occasional duty of judicial creativity will not work either, as I have explained and Judge Manion more fully. We thus cannot avoid the task of trying to create a set of agency principles that will deter sexual harassment without imposing an unreasonable burden on employers. I do not consider the burden of liability on employers a negligible consideration in formulating federal common law rules to govern aspects of employment regulation. Our labor markets are becoming choked by regulation, all well meaning but cumulatively an impediment to the efficient employment of the nation's most valuable economic resource, which is its workers.

I emphasize *deterring* sexual harassment rather than *compensating* its victims because, unlike many torts—and again the clearest illustrations are torts that inflict physical injury—sexual harassment does not usually bring about a significant change in the victim's wealth. The victim may be humiliated and deeply distressed by it; rarely will she (or the very occasional he) be impoverished by it. This is not to say that psychological pain should not figure in the calculation of damages. It should. All I wish to emphasize is that an award of damages in these cases is not *primarily* designed to protect the victim's standard of living. The payment of damages in the usual case of sexual harassment is an instrument for deterring future incidents of such harassment rather than for restoring lost earnings or for financing expensive curative or rehabilitative measures.

There is no novelty in grounding principles of agency on deterrence. A recognized objective of imposing "vicarious" liability for the torts of employees (the liability that goes by

the name of "respondeat superior") is to reduce the amount of tortious behavior. *Hartmann v. Prudential Ins. Co.*, 9 F.3d 1207, 1210 (7th Cir.1993); *Konradi v. United States*, 919 F.2d 1207, 1210 (7th Cir.1990); Alan O. Sykes, "The Boundaries of Vicarious Liability," 101 *Harv. L. Rev.* 563, 570 (1988). Our court has adopted (and it is not alone in doing so) the deterrent perspective as its guide to dealing with cases involving the creation of a hostile environment by the plaintiff's coworkers. The standard of employer liability in those cases is negligence: an employer who knew or should have known about the harassment and failed to take reasonable remedial measures is liable. *McKenzie v. Illinois Dep't of Transportation*, 92 F.3d 473, 480 (7th Cir.1996); *Baskerville v. Culligan International Co.*, 50 F.3d 428, 432 (7th Cir.1995); *Carr v. Allison Gas Turbine Division*, 32 F.3d 1007, 1009 (7th Cir.1994); *Doe v. Lago Vista Independent School District*, 106 F.3d 1223 (5th Cir.1997); *Rosa H. v. San Elizario Independent School District*, 106 F.3d 648, 656 (5th Cir.1997); *Splunge v. Shoney's, Inc.*, 97 F.3d 488, 490 (11th Cir.1996); *Burns v. McGregor Electronic Industries, Inc.*, 989 F.2d 959, 966 (8th Cir.1993). The thinking is that if the employer has a realistic opportunity to prevent harassment, he must take it.

But if the goal is deterrence, why, it may be asked, is the standard negligence rather than strict liability? The reason is the infeasibility of an employer's stamping out this sort of harassment without going to extreme expense and greatly curtailing the privacy of its employees, as by putting them under continuous video surveillance. If the victim of sexual harassment complains to a supervisor, or a worker who notices what's going on complains to a supervisor, or the harassment is so pervasive (considering its nature, frequency, and number of victims and perpetrators) that the employer knows or should know about the harassment, the employer

ought to take steps to correct the problem. He has or should have the information; he has only to act upon it. And since everyone knows by now that sexual harassment is a common problem in the American workplace, the employer ought in addition to take, in advance of specific cases of harassment, preventive measures against it, as by adopting and announcing a policy against sexual harassment and creating a discreet and convenient machinery by means of which victims can obtain relief without exposing themselves to retaliation. These are the responsibilities that a negligence standard imposes. They should deter most sexual harassment by coworkers without the courts' subjecting the employer to strict liability. A law that requires the employer to do more than is feasible to control harassment will impose costs without creating deterrent benefits. In the long run, these costs will be borne largely by consumers, in the form of higher prices for the employer's product, and workers, in the form of lower wages (because the higher costs are labor costs). Many consumers and workers are women, so women, who are the principal victims of sexual harassment, will pay a big part of the costs that employers incur as a consequence of excessively harsh principles of employers' liability.

In these circumstances, strict liability would not only be expensive and unnecessary, and possibly regressive as well; it would be futile. If the law imposes liability in harassment cases in which there is no reasonable measure that the employer could have taken to prevent the harassment, the only effect of the law will be to impose extra costs on employers and those with whom they are linked contractually. Employers will prefer paying the occasional judgment to incurring costs that, by definition, exceed the employer's foreseeable liability—by definition because, were the costs less than the expected liability, the failure to incur them would be negligence; it is only when they are greater, so that

the employer would not be negligent for failing to incur them, that strict liability bites. The bite may come out of the hides of innocent workers and consumers, rather than deterring any more harassment than a negligence standard would do.

What this shows is that strict liability doesn't always have the happy result of just deterring a bad practice more effectively than the negligence standard. Sometimes the incremental contribution of strict liability to deterrence is nil or slight, and easily outweighed by the additional costs of a more expansive liability. This is implicit in the rejection of strict liability for coworker harassment cases, a rejection to which I believe all members of this court subscribe.

But the cases in which the issue is the employer's liability for harassment by coworkers are the easy ones. The difficult ones are those in which, as in the cases before us, the harasser is a supervisor rather than a line employee. We must distinguish between two types of sexual harassment by supervisors. In the first type, the supervisor uses or attempts to use his supervisory authority to obtain sexual favors from an employee. This is the domain of what has come to be called "quid pro quo" harassment. In the second type of case, the supervisor does not use or attempt to use his supervisory authority at all. He harasses an employee, but he does so in exactly the same way that an employee who had no supervisory authority would harass another employee. He uses unwanted terms of endearment; he fondles or rubs up against his victim; he displays sex toys or tells dirty jokes; he brags about his sexual skills; he proposes marriage; he threatens to kill himself; in the extreme case, illustrated by *Martin v. Cavalier Hotel Corp.*, 48 F.3d 1343 (4th Cir.1995), he rapes her. These are modes of harassment equally available to a nonsupervisory employee. The proper standard of employer liability here is negligence, just as in the case of harassment by nonsupervisory employees, because it is as

costly for the employer to police this kind of harassment by a supervisor as it is to police the identical harassment by a coworker. I believe that we all have qualms about *Martin*, the case that carries strict liability for the acts of a supervisory employee to its logical extreme.

Although the standard should be the same in the two types of hostile-environment case, the application of the standard is bound to differ as a practical matter. Even if the supervisor is scrupulous in forbearing to invoke his authority over the employee he is harassing, the existence of that authority is a fact of which the victim is bound to be constantly aware. She is more likely than in a case of coworker harassment to submit and less likely to complain. She may believe that because her harasser is a supervisor he is highly valued by the company and that as a consequence the higher-ups in the company will reject her complaint—will in fact fire her, not the harasser. Because such fears will often be reasonable, due care on the part of employers to prevent sexual harassment by its supervisory employees may require the creation of additional complaint machinery when the complaint is against a supervisor. Whether the employer had complied with this heightened duty of due care would be a jury issue in the first instance.

But I would not go further and impose strict liability on the employer for hostile-environment harassment by a supervisor. The "theory" that by making him a supervisor the employer had clothed him with the appearance of authority to harass employees is empty. Since everyone knows by now that sexual harassment is unlawful, a company that publicizes and enforces a stern policy against sexual harassment has done all that it can reasonably be expected to do to dispel its supervisors' "apparent authority" (to lapse into *Restatement*-speak) to harass. The adequacy of the policy in the circumstances (what if the harasser is the chief executive

officer of the employer?) is a factor to be considered in making the required determination of negligence. There is no need to have a separate standard just because the harasser is a supervisor. Excessive complexity is the bane of American law; we have an opportunity to make it a little simpler.

So much for hostile-environment harassment. Let me turn now to quid pro quo harassment. We have to distinguish between two types of such harassment. In the first, the supervisor brings about a significant alteration in the terms or conditions of his victim's employment. He fires her, or denies her a promotion, or blocks a scheduled raise, or demotes her, or transfers her to a less desirable job location, or refuses to give her the training that the company's rules entitle her to receive. In all these examples the supervisor is using his delegated authority to do a company act. Strict liability is appropriate in this kind of case, because it is likely to deter this kind of sexual harassment more effectively than negligence liability would. The employer who is strictly liable will monitor the exercise of this delegated authority very carefully, knowing that it will be liable if the authority is abused. And this monitoring should be relatively easy to do. For it is usually a mistake for a firm, quite without regard to any potential legal liability, to give a supervisor *unilateral* authority to alter a subordinate's terms or conditions of employment significantly. In well-managed companies, decisions having such consequences are subject to rules, and to review by higher-ups in the company—the industrial equivalent of appellate review. The rules will be more carefully formulated and the supervisor's compliance with them in firing or otherwise hurting a subordinate more carefully reviewed by the supervisor's superiors if the employer is strictly liable for the supervisor's use of his delegated powers to harass subordinates. Courts applying a negligence standard would have great difficulty determining

how closely the supervisor should be supervised. Such questions as how many tiers of review should be provided before an employee can be fired or demoted are not easily answered in terms of reasonableness or due care, the criteria of negligence. The regime of strict liability shifts the responsibility for deciding these questions to the employer, who knows more than judges do about how to control supervisory employees.

Could the argument that I have just sketched be made in support of strict liability for *all* sexual harassment by company employees, including harassment by coworkers? Employers know more than we do about how to extirpate that form of workplace sexual harassment too. True; but courts know, more or less, what is reasonable for the employer to do about hostile-environment harassment— institute a tough policy, disseminate it, establish a procedure by which a worker can complain without fear of retaliation (so don't require that the complaint be made to the man who is harassing her!), respond promptly and effectively to any report of possible harassment. Knowing what the employer should do, the courts have only to decide whether he did it, in order to decide whether he was negligent and should be liable. But when it comes to designing the optimum system for reining in the discretion of supervisory employees, the courts are at sea and it makes sense therefore to shift the responsibility entirely to the employer to create and administer an effective system for the review and control of company actions taken by supervisors in the exercise of their delegated authority.

Strict liability is inappropriate, however, when the supervisor merely makes threats, even if the threats are effective. This is why it is important to distinguish between the type of quid pro quo harassment in which the supervisor actually alters the terms or conditions of his victim's

employment and the type of harassment in which he merely threatens to do so, whether or not the victim yields to the threats. Suppose the supervisor threatens to fire a subordinate unless she'll have sex with him, and she agrees—or refuses and he does not carry out his threat. In either case, because he has not used his delegated authority to commit a company act, there is no way in which a system for vetting such acts would catch him out. In a well-regulated company a supervisor who wants to fire a subordinate has to obtain the approval of higher-ups, as I have said, and they will have an opportunity therefore to determine the bona fides of his proposal. But if he doesn't propose to fire her, whether because she has submitted to his sexual extortion or called his bluff, there will be no proposed action to review. It will be no more feasible for the company to determine what is going on than it would be if the harasser were a coworker who had threatened to steal the victim's work tools if she didn't submit to him.

Romantic encounters, including romantic encounters between supervisors and supervised, are a fact of the workplace. Title VII does not purport to forbid them, and would be quixotic if it did. Many happy marriages have grown out of such encounters. Some of the encounters are abusive from the start, and some start well and turn ugly and engender charges of sexual harassment that sometimes have and sometimes lack merit. The words, the gestures, the other behaviors that differentiate the fully consensual relationship from the coercive relationship will often be invisible to the supervisor's superiors. The yielding to a threat will look no different from the yielding to a lawful proposal. It is only when the threat is carried out that the abusive supervisor does something, such as firing the supervised employee, that the employer will know about and should monitor. It is facile to suggest that employers are quite capable of monitoring a

supervisor's actions affecting the work environment. Large companies have thousands of supervisory employees. Are they all to be put under video surveillance? Subjected to periodic lie-detector tests? Trailed on business trips by company spies? Even the EEOC does not go so far. The culminating recommendation in its "Guidelines on Discrimination Because of Sex" to employers is that they should "develop [ ] methods to sensitize all concerned" to the problem of sexual harassment. 29 C.F.R. § 1604.11(f). This is easy to say, but, as the armed forces have recently discovered to their sorrow, hard to do. It is unrealistic to expect that adopting strict liability in lieu of negligence, a relatively esoteric and marginal change in the law, will do much to create a corporate culture in which sexual harassment is unthinkable. Granted, the problem of monitoring the noncompany acts of supervisory employees is primarily a problem of large employers, for in companies that are at or near the statutory minimum of 15 employees, 42 U.S.C. § 2000e(b), noncompany acts will presumably be visible to top management, creating de facto strict liability. But it is the large companies that are the usual targets of litigation, because of their deep pockets.

The distinction that I am proposing between the harassing supervisor who commits a company act, such as firing, and the supervisor who merely threatens such acts, has at least a footing in the case law. See *Gary v. Long*, 59 F.3d 1391, 1396 (D.C.Cir.1995); *Sauers v. Salt Lake County*, 1 F.3d 1122, 1127 (10th Cir.1993); *Kotcher v. Rosa & Sullivan Appliance Center, Inc.*, 957 F.2d 59, 62 (2d Cir.1992); *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1414 (10th Cir.1987). There are hints of it in Judge Easterbrook's and Judge Kanne's separate opinions. It is, for sure, not the orthodox approach, see, e.g., *Karibian v. Columbia University*, 14 F.3d 773, 778 (2d Cir.1994); *Highlander v. K.F.C. Nat'l*

Management Co., 805 F.2d 644, 648 (6th Cir.1986); I would go so far as to concede that it has the curse of novelty; but the cases that take the orthodox approach do not explain why they do so, and the approach that I am proposing in its stead is not foreclosed by any decisions of the Supreme Court. The Court in *Meritor* said that Congress intended "to place some limits on the acts of employees for which employers under Title VII are to be held responsible." 477 U.S. at 72. It didn't tell us what those limits are.

We can test my proposed approach by considering its application to other forms of discrimination forbidden by Title VII. The closest parallel is sex discrimination that does not involve harassment in the usual sense. Compare two cases. In one, a supervisor denies a raise to a subordinate because of her sex. In another, the supervisor slaps her because of her sex. In the first case, the supervisor has done a company act, and the company is strictly liable. In the second case, the supervisor has not done a company act, and there is no liability under Title VII unless the employer was negligent in hiring or failing to fire or supervise the employee. In *Restatement*-speak, the supervisor in the second case has not acted in the employer's interest; but that is just a conclusion. The practical reason why the employer is not liable is that the supervisor's act took place outside the channels in which action by supervisors is realistically controllable by their superiors.

The distinction between company and noncompany acts points the way to the proper handling of a theoretical third category of supervisor sexual harassment. That is where the supervisor uses his supervisory authority to create a hostile work environment, perhaps by encouraging his male subordinates to harass his female subordinates. If he does this without committing any company acts, then the case should be assimilated to the ordinary case of noncompany

harassing acts by a supervisor, and the employer's liability should be governed by negligence. If the supervisor commits company acts, then the employer should be strictly liable. As a practical matter, the employer will be liable in almost any case in which a supervisor is orchestrating a campaign of sexual harassment, for the employer will either learn of the campaign or be negligent in failing to notice it.

I do not think it is an objection that my proposed approach might occasionally require applying different standards of employer liability to different conduct of the same supervisory employee, whose sexual harassment of a subordinate might include both company acts and noncompany acts. Suppose a worker got drunk at a company party and on his way out of the building bumped into and injured a customer, then got into his car and on his way home hit a pedestrian, both accidents being due to his drinking. The company would be strictly liable to the customer—respondeat superior would apply—but the pedestrian would have to prove the company negligent in order to establish its liability to him, because the drive was not within the scope of his employment.

My proposed approach is summarized in the following table. The term "company act" signifies an act that significantly alters the terms or conditions of employment of the victim of sexual harassment and "noncompany act" signifies hostile-environment harassment by coworkers or supervisors or the kind of quid pro quo harassment that involves only unfulfilled threats (either because the victim submits or because she calls the supervisor's bluff), so that no company act is committed. The difficult borderline case is that of constructive termination precipitated by a threat. The termination will look to the supervisor's superiors like a voluntary quit. But since there is always some paperwork involved in an employee's quitting, the higher-ups in the

company will have some ability to monitor constructive discharges, and I would therefore impose strict liability in such cases.

LIABILITY FOR SEXUAL HARASSMENT UNDER TITLE VII: A SUGGESTED APPROACH

	By supervisor	**By coworker**
"Company act"	employer strictly liable	N.A.
"Noncompany act"	employer liable only if negligent	employer liable only if negligent

I now apply the suggested approach to the facts of our two cases. In *Jansen* there was no company act and therefore no quid pro quo violation. Antoni did hold up Jansen's performance review and raise for several months, but the review was favorable, the raise was made retroactive, and Jansen herself admits that delays of the length she encountered were commonplace. The delays she encountered were not significant alterations in the terms or conditions of employment—therefore were not "company acts" as I am using that term in order to denote the proper scope of quid pro quo liability. For they were not visible to and therefore corrigible by higher-ups in the company. The tenuous character and trivial consequences of Antoni's threat furnish a practical argument for the limited scope of quid pro quo liability that I am urging.

Jansen has, however, presented enough evidence to establish a prima facie case of hostile-environment harassment. What Antoni did to Jansen over a period of some eighteen months—a barrage of threats and sexual solicitations—was highly offensive, and not mere sexual banter or even the kind of mildly obnoxious vulgarity that we

held in *Baskerville v. Culligan International Co.*, *supra*, did not rise to the level of actionable harassment. The only issue is whether Packaging Corporation should have discovered what was going on. The answer is yes, a tentative yes but one that can be given with enough confidence to defeat summary judgment for the employer. Two previous complaints of sexual harassment had been lodged against Antoni. The second, it is true, was somewhat cryptic; but the company's response to it, which was to counsel Antoni about the company's sexual harassment policy, showed that Packaging Corporation "read" the complaint as one of sexual harassment, as it pretty obviously was. Antoni was also well known to be having sex with another worker, and while this relationship was apparently consensual, the fact that he was married to someone else at the time should have alerted the company to the possibility that he was sexually incontinent. The company's lackadaisical if not perverse reaction to Jansen's complaint (accusing *her* of sexual harassment) is further evidence of the company's negligence with regard to the harassment of female employees.

So the grant of summary judgment to Packaging Corporation with regard to the charge of sexual harassment should be reversed. But the only issue for determination by the jury on remand should be whether the company was negligent in failing to protect Jansen from Antoni. There is, moreover, a serious question whether she can obtain substantial damages, given her failure to complain for eighteen months. We have held that the doctrine of avoidable consequences, on which see, e.g., *Outboard Marine Corp. v. Babcock Industries, Inc.*, 106 F.3d 182, 184 (7th Cir.1997); *Ellerman Lines, Ltd. v. S.S. President Harding*, 288 F.2d 288, 289-90 (2d Cir.1961) (Friendly, J.); Keeton *et al.*, *supra*, § 65, pp. 458-59, is applicable to violations of Title VII as to other torts. *Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417,

1427 (7th Cir.1986). The precise issue is whether if Jansen had complained sooner the company would have taken effective action. This is uncertain given the lackluster way in which the company responded when she did complain. The uncertainty creates an issue for a jury.

On my view of the scope of quid pro quo liability, *Ellerth* like *Jansen* is purely a hostile-environment case. Slowik was Ellerth's supervisor. It is of no consequence, so far as his supervisory authority over her was concerned, that there was another supervisor in between them; this just shows how much power he had over her, given that he was that much higher in the corporate hierarchy. But he never committed a company act against her, such as denying her a promotion, although he obliquely threatened to do so. Therefore she should have to show that the company was negligent in failing to detect and prevent the harassment. The evidence of negligence is too thin to create a jury issue—so it is no surprise that Ellerth doesn't even argue that Burlington *was* negligent. Although aware of the company's policy against sexual harassment, Ellerth did not complain about Slowik to anyone in the company's human resources department or to anyone else who might have taken corrective action; she did not complain to her supervisor. Unlike Jansen's employer, Burlington Industries had no other sources of information about its supervisor's misbehavior. The fact that Slowik told off-color jokes and commented on Ellerth's legs at a lunch in which a vice-president of Burlington was present could not be thought to put Burlington on notice of probable harassment. The vice-president had no reason to think Ellerth offended by Slowik's banter; not all women would be. (Slowik had also patted Ellerth's knee under the table at that lunch, but there is no indication that this was visible to the vice-president.) Although there is a bit of evidence that Slowik may have harassed another woman employed by

Burlington, there is no evidence that this other harassment came or should have come to the attention of any higher-ups in the company. The fact that Ellerth complained to a few of her fellow nonsupervisory employees (and toward the end to a customer service manager) also did not put the company on notice. The precedents in our court and the other circuits do not authorize the basing of a finding of negligence on such scraps of evidence. See, e.g., *Doe v. R.R. Donnelley & Sons Co.*, 42 F.3d 439, 447 (7th Cir.1994); *Juarez v. Ameritech Mobile Communications, Inc.*, 957 F.2d 317, 320-21 (7th Cir.1992); *Murray v. New York University College of Dentistry*, 57 F.3d 243, 250 (2d Cir.1995). A case in which the plaintiff does not think enough of her ability to prove negligence to even raise a negligence claim would be a pretty dubious vehicle for going beyond the precedents.

But it is an even weaker case for negligence than I have yet let on. Ellerth's claim that she feared that complaining about Slowik would cost her her job is inconsistent with her claim that she quit the company because Slowik had made her working conditions unbearable. If the choice is to quit the company or complain, you obviously should complain, since if the complaint gets you in trouble you're no worse off than you would have been quitting—unless you are seeking a reference for your next job, and there is no evidence of that in Ellerth's case.

Her action in quitting rather than complaining underscores the importance of agency principles that place appropriate pressure on victims of sexual harassment to protect themselves from harassment by complaining to the harasser's superiors. Tort law in general allocates responsibility for the avoidance of nonintentional injuries (not just for their consequences) to both injurer and victim, rather than to the injurer alone. Sexual harassment is an intentional injury by the harasser, but an unintentional injury (in the usual case and

in the two cases before us) by the harasser's superiors, or in other words by the employer itself. The employer is innocent; the victim is innocent; the optimal system of liability for minimizing sexual harassment requires cooperation by both. Once Ellerth decided that Slowik had made the workplace unendurable, she had nothing to lose and everything to gain by complaining. It follows that as between her and her employer, she was in the better position to prevent the misconduct of her supervisor. Slowik had a responsibility to his principal not to harass Ellerth, but Ellerth had a responsibility to her principal too—a duty to complain about Slowik through proper channels. With rights should come responsibilities.

In any event, Ellerth explicitly waived negligence as a ground for Burlington's liability, and so it is not available as a basis for reversing the judgment in Burlington's favor. In her reply to the petition for rehearing, repeating what she had said earlier in her brief on appeal, Ellerth states, "Appellant [Ellerth], in fact, *agrees* with Burlington that § 219(2)(b) does not apply to this case" (emphases in original). The reference is to section 219(2)(b) of the *Restatement*—the section that makes an employer liable for the torts of his employee if the employer is negligent.

COFFEY, *Circuit Judge*, concurring in part and dissenting in part. I concur with the majority view, set forth in the Court's *per curiam* opinion, that the district judge properly dismissed Jansen's retaliation and intentional infliction of emotional distress claims. Per Curiam Op. at p. 3. I also agree with the majority that in *Jansen* the district judge's grant of summary judgment in favor of PCA should be reversed and remanded in order that a jury might address the *limited* question of whether PCA was negligent with respect to the alleged hostile work environment sexual harassment by Jansen's supervisor. Per Curiam at pp. 4-5. I write separately because I do not agree that an employer who lacks knowledge of harassment by one of its supervisors should be held strictly liable under "agency principles," in spite of the fact that the employer may have had every intention of eliminating such conduct from the workplace, and may even have formulated and publicized a complete sexual harassment policy. I am unable to join with **Judges Posner, Flaum, and Diane Wood,**[1] each of whom, in differing degrees, urges that we use the cases before us as a vehicle for announcing bold and unprecedented Seventh Circuit law that will make employers strictly liable in Title VII cases involving allegations of sexual harassment by a supervisor. I am convinced that the creation of a strict liability standard is contrary to the Supreme Court's decision in *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986), and is at odds with the "agency principles" that the High Court has instructed us to consider in Title VII cases.

Strict liability for *quid pro quo* harassment by supervisors amounts to almost "guilt by association," a concept that is

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[1] I identify Judge Wood in this opinion as Judge Diane Wood, as we have another most distinguished and learned member of the court named Harlington Wood, Jr.

fundamentally unfair as well as being inconsistent with "agency principles." Under a regime of strict liability, the employer—similar to the taxpayer who is assessed a tax deficiency by the IRS—would be presumed guilty, and the traditional presumption of innocence cast aside; thus, the employer would be required to bear the burden of proving his innocence.[2] Because the employer saddled with strict liability would not be permitted to argue that it lacked knowledge of the harassment or that it had in place measures to prevent the same, it would have only a *limited* opportunity to rebut this judicially-created presumption of guilt. In a *quid pro quo case*, for example, the employer could avoid liability by proving that the alleged harassment did not occur, but the many factors that can and should weigh against a finding of *negligence* on the part of the employer (i.e., knowledge, preventive measures, sexual harassment policy) become irrelevant once strict liability is adopted. Judicially legislating a strict liability standard will also serve to increase the volume of Title VII litigation and impose a costly burden on American business that will obviously be passed on to taxpayers, workers, and consumers (as with judicial decisions that have continuously expanded tort liability in the products liability and professional malpractice areas).

With due respect for my fellow judges, the approaches advocated by **Judges Posner, Flaum, Easterbrook** and **Wood** disregard the need for judicial restraint and faithfulness to precedent in this highly-charged area of the

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[2] "Generally speaking, the [IRS'] tax deficiency assessments are entitled to the 'presumption of correctness.' This presumption imposes upon the taxpayer the burden of proving that the assessment is erroneous." *Gold Emporium, Inc. v. C.I.R.*, 910 F.2d 1374, 1378 (7th Cir.1990) (citing *Welch v. Helvering*, 290 U.S. 111, 54 S.Ct. 8, 78 L.Ed. 212 (1933)); *see also* Tax Court Rule 142. The presumption is rebuttable. *McCabe Packing Co. v. United States*, 809 F.Supp. 614, 616 (C.D.Ill.1992).

law, and dramatically tip the very delicate balance of the scales of justice in favor of Title VII plaintiffs.[3] As the Supreme Court noted in *Meritor*, the Congress when it enacted Title VII provided little guidance as to how the statute was to be applied in cases of sexual harassment:

> The prohibition against discrimination based on sex was added to Title VII *at the last minute* on the floor of the House of Representatives. . . . The principal argument in opposition to the amendment was that 'sex discrimination' was sufficiently different from other types of discrimination that it ought to receive separate legislative treatment. . . . This argument was defeated, the bill quickly passed as amended, and we are left with little legislative history to guide us in interpreting the Act's prohibition against discrimination based on 'sex.'

Id. at 63-65 (citations omitted). However, "the fact that Congress might have acted with greater clarity or foresight does not give courts a *carte blanche* to redraft statutes in an effort to achieve that which Congress is perceived to have failed to do." *United States v. Locke*, 471 U.S. 84, 95, 105 S.Ct. 1785, 1793, 85 L.Ed.2d 64 (1985). The Court recognized this in *Meritor* when it advocated "agency principles" and concluded "that the Court of Appeals was *wrong* to . . . impose absolute [strict] liability on employers for the acts of their supervisors." *Meritor*, 477 U.S. at 73 (emphasis added).

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[3] Similarly, I note that "the availability of a recovery in tort *without proof of negligence* as a cause of a damaging event has *vastly* improved a [plaintiff's] opportunity for recovery against a manufacturer or other supplier of a product that was involved in such an event." W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 99 (Fifth ed.1984) (emphasis added).

We should take our cue from the Supreme Court's *Meritor* decision and, in an exercise of judicial restraint, hold that an employer is liable for a supervisor's acts of sexual harassment under the negligence standard *only if and when the plaintiff can demonstrate that the employer knew or should have known of the alleged harassment and failed to take appropriate measures. Juarez v. Ameritech Mobile Communications, Inc.*, 957 F.2d 317, 320 (7th Cir.1992). Additionally, the imposition of vicarious liability might conceivably be proper in that rare situation (not presented in either *Jansen* or *Ellerth*) where a plaintiff is able to establish that the supervisor acted with actual or apparent authority to engage in such conduct. *Restatement (2d) Agency* § 219(2)(a) & (d).

A strict liability standard, in contrast with the more flexible and reasonable negligence standard, will preclude us from accounting for "the circumstances of [each] particular case," *Meritor*, 477 U.S. at 73, including the disparate corporate structures in modern business life. As **Judge Wood** explains, Title VII runs the ambit in its application, reaching small firms with as few as fifteen employees, as well as large entities such as General Motors, with some 692,800 workers. Wood Op. at p. 183. For **Judge Wood** to suggest, however, that a supervisor who stands on the second lowest (the 692,799th) rung of the corporate ladder at General Motors "stands in the place of [his] principal," Wood Op. at p. 184, to the same extent that the lowliest supervisor (the fourteenth employee) does at a fifteen person firm is untenable and reaches beyond reasonableness. To impose strict liability merely because an employee is designated as a "supervisor" in my view disregards the realities and complexities of modern corporate America.

I. EMPLOYER LIABILITY UNDER TITLE VII

A. *Title VII Is Not A Strict Liability Statute*

When called upon to determine when an employer may be held liable under Title VII for sexual harassment by one of its supervisors, we must start with the Supreme Court's clear and unambiguous mandate in *Meritor* that we "look to agency principles." 477 U.S. 57, 77, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986). The High Court in *Meritor*, far from endorsing an all-expansive interpretation of "agency principles," specifically rejected strict liability and made clear that agency principles provide a *limitation* on employer liability rather than a blank check for expanding liability. *Id.* Specifically, the *Meritor* Court stated:

> We . . . decline the parties' invitation to issue a definitive rule on employer liability, but we do agree . . . that *Congress wanted courts to look to agency principles for guidance* in this area. While *such common-law principles may not be transferable in all their particulars to Title VII*, Congress' decision to define 'employer' to include any 'agent' of an employer, 42 U.S.C. § 2000e(b) surely evinces an intent to place some *limits* on the acts of employees for which employers under Title VII are to be held responsible. For this reason, we hold that *the Court of Appeals erred in concluding that employers are always automatically liable for sexual harassment by their supervisors*. See generally Restatement (Second) of Agency §§ 219-237 (1958).

Id. (emphasis added). *Meritor*'s rejection of strict liability remains the law, and has not been superseded by any precedent from the Nation's highest court, although some courts, in attempting to apply "agency principles," have improperly concluded that strict liability is mandated in sexual harassment cases. Curiously, even **Judge Wood**, who

champions a sweeping strict liability standard, concedes that "the *Meritor* Court viewed agency principles as *limiting*, not expansive, factors in determining liability." Wood Op. at p. 177.

The political winds of change have apparently affected the views of the EEOC regarding employer liability, for while the EEOC, as *amicus curiae*, argued for a negligence standard in *Meritor*, it now urges us to adopt a "strict liability" rule in cases where a supervisor has allegedly harassed a subordinate. The EEOC's former position was that:

> If the employer has an expressed policy against sexual harassment and has implemented a procedure specifically designed to resolve sexual harassment claims, and if the victim does not take advantage of that procedure, *the employer should be shielded from liability absent actual knowledge of the sexually hostile environment* . . . . In all other cases, the employer will be liable if it has actual knowledge of the harassment or if, considering all the facts of this case, the victim in question had no reasonably available avenue for making his or her complaint known to appropriate management officials.

Meritor, 477 U.S. at 71 (quoting Brief for United States and EEOC as Amici Curiae). *At oral argument, **Judge Wood** attempted to explain away this patent inconsistency between the EEOC's previous and current positions on the grounds that* "Meritor *is ten years old . . . . We have come, you know, a very long way in ten years.*" *Meritor* should be dispositive of the issues before us, and I disagree with the suggestion that we as judges on a United States Circuit Court of Appeals have a license to take the law beyond *Meritor* simply because that decision may not comport with our individual notions of social progress in 1997.

The Supreme Court in *Meritor* also recognized that the "existence of a grievance procedure and a policy against discrimination," while not necessarily dispositive, is "*plainly relevant*" and definitely a fact that should be considered in determining the extent of an employer's Title VII liability. *Id.* at 72-73. The Court's willingness to acknowledge the liability-mitigating effect of an anti-discrimination policy, *even when the harasser is a supervisor*, makes clear that in the interest of justice and fairness, we are bound by a negligence standard in *all* sexual harassment cases, regardless of the perpetrator's rank vis-a-vis his victim.

Because *Meritor* was a hostile work environment case,[4] the Court did not definitively reach the question of an employer's liability for quid pro quo harassment by a supervisor. Nevertheless, there are courts which purport to follow *Meritor* and have "look[ed] to agency principles" as a vehicle to expand *Meritor*'s holding and conclude that strict liability is the proper standard in supervisory *quid pro quo* cases. *See, e.g., Nichols v. Frank*, 42 F.3d 503, 513-14 (9th Cir.1994) (collecting cases); *but see Nash v. Electrospace System, Inc.*, 9 F.3d 401 (5th Cir.1993) (Title VII is not a "*strict liability*

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[4] I do not agree with **Judge Wood** that *Meritor* involved allegations of *quid pro quo* harassment by a supervisor. Wood Op. at p. 176 While, as **Judge Flaum** notes, the original compiaint may have contained allegations of *quid pro quo* harassment, neither the district court, the Court of Appeals, nor the Supreme Court resolved the case on a *quid pro quo* theory of liability. Flaum Op. at p. 21 n. 8. **Judge Wood's** insistence that *Meritor* presented both a hostile work environment and a *quid pro quo* claim dovetails well with her argument that the two types of harassment are effectively one and the same, and should therefore both be measured under a strict liability standard. Nor should we assume (as **Judge Cudahy** does) that *Meritor*, by "implication," suggested differing standards of employer liability for *quid pro quo* and hostile work environment claims. Cudahy Op. at p. 29.

statute for employers"). Our own post-*Meritor* decisions to date have not specifically addressed the issue of whether an employer is strictly liable for *quid pro quo* harassment by a supervisor, except to state in clear and unambiguous language that this *remains an open question* in light of *Meritor*. As **Chief Judge Posner**, writing for this court, explained just two years ago:

> An employer is not strictly liable for sexual harassment of one worker by another unless, *perhaps*, the harassment takes the form . . . of an abuse of authority, as where a supervisor threatens to fire a subordinate if she refuses to have sex with him. In such cases, a number of courts treat the supervisor as the employer, *whether correctly or not we need not decide.* (*Neither the Supreme Court nor our court has had occasion to decide the question.*) In all other cases, it is clear, the criterion for when an employer is liable for sexual harassment is *negligence*.

Baskerville v. Culligan International Co., 50 F.3d 428, 431-32 (7th Cir.1995) (emphasis added) (citations omitted).

Prior to *Meritor*, this circuit for a brief period adhered to a rule of strict liability, as set forth in *Horn v. Duke*, 755 F.2d 599 (7th Cir.1985). Although my respected colleague **Judge Flaum** relies to an extent upon the reasoning in *Horn* (*see* Flaum Op. at pp. 10-11, 13), this reliance is at best confusing, for the *Horn* case was decided one year *before* the Supreme Court's *Meritor* decision, and *Horn* has since been *called into question* by this court. In *North v. Madison Area Ass'n for Retarded Citizens*, for example, we addressed the proper scope of employer liability in the context of a race-discrimination claim under Title VII, and, in light of *Meritor*, *we disavowed* Horn's *rule of strict liability*. *North*, 844 F.2d 401, 407 (7th Cir.1988). Our post-*Meritor* decision in *North*, though it concerned race discrimination and not sexual

harassment, nonetheless addressed the proper scope of an employer's liability for the discriminatory acts of a supervisor. In *North*, we stated unequivocally that "in light of the decision in *Meritor . . . employers are no longer to be held to . . .* a *strict standard in every case in which the actions of a supervisory employee are in question.*" *Id.* (emphasis added). This court's *North* decision held that in the absence of evidence that the supervisor acted with actual or apparent authority,[5] the employer "could be held liable for discriminatory actions which were attributable to [the supervisor] *only if it knew or should have known of those actions and failed to take reasonable remedial measures.*" *Id.* I am at a loss to understand why this court should wish to reverse course and *re-instate* a strict liability rule that we have held to be improper under *Meritor*.

This court has consistently rejected the strict liability principle in the context of sexual harassment cases involving non-supervisory employees. In *Juarez*, for example, a 1992 opinion **Judge Cudahy** authored, we cited *Meritor* for the proposition that "*[e]mployers are not strictly liable under Title VII for sexual harassment engaged in by their employees*" and we proceeded to analyze the facts of the case under the accepted "knew or should have known" rubric (i.e., negligence). 957 F.2d at 320; *see also Baskerville*, 50 F.3d at 431-32.

In line with the principles enunciated in *Meritor*, we should apply a negligence standard in the cases before us, and in all cases where a plaintiff seeks to hold an employer liable for

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[5] Neither Jansen nor Ellerth argue that their supervisors acted with "actual authority" to engage in sexual harassment, but Jansen does claim that her supervisor acted with "apparent authority." As discussed below, I am of the opinion that Jansen has failed to introduce evidence sufficient to proceed to trial on her apparent authority claim.

acts of sexual harassment allegedly committed by another employee. Notice to the employer (i.e., knowledge) is a key component of the negligence standard. As **Chief Judge Posner** very recently observed (in an opinion which I joined along with **Judge Easterbrook**), an "employer's duty to investigate and if appropriate take remedial measures is not activated *until the employee complains of sexual harassment or information about the harassment comes to the employer's attention* from some other quarter." *Zimmerman v. Cook Co. Sheriff's Dept.*, 96 F.3d 1017, 1019 (7th Cir.1996).[6] What constitutes "appropriate remedial action" depends on the gravity of the alleged harassment in a particular case, the information made available to the employer, and of course, the type of corrective action instituted. *Baskerville*, 50 F.3d at 432 ("Just as in conventional tort law a potential injurer is required to take more care, other things being equal, to prevent catastrophic accidents than to prevent minor ones, so an employer is required to take more care, other things being equal, to protect its female employees from *serious* sexual harassment than to protect them from *trivial* harassment.").

B. *The Nature of Strict Liability*

Before we even think about jettisoning the strict liability doctrine into the law of employment discrimination in this circuit, it is imperative that we examine in some depth the nature of the strict liability doctrine as well as its origins and purpose in tort law. We must analyze and determine in the interests of justice whether strict liability, whatever its arguable merits in other areas of the law, is well-suited to the

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[6] An employer may also be held liable for negligence if it failed to exercise "due care in hiring the offending employee in the first place." *Guess v. Bethlehem Steel Corp.*, 913 F.2d 463, 46 (7th Cir.1990). Neither Jansen nor Ellerth allege negligence in hiring, nor is there any evidence in the respective records to support such claims.

Title VII context. Under a strict liability theory, *the plaintiff need not establish that the employer was negligent or blameworthy, or that the employer authorized, condoned, or sanctioned harassment in the workplace, for the defendant under this theory is strictly liable, or liable "without fault."* W. Page Keeton et al, *Prosser and Keeton on the Law of Torts* § 75, at 534 (5th ed.1984). *Strict liability or "liability without fault" is the exception rather than the norm* in Anglo- American tort law, for traditionally the doctrine has been confined to those situations where a defendant "engaged in some kind of activity which exposed others to a risk of harm. . . ." *Chicago, Milwaukee St. Paul & Pacific Railroad Co. v. Union Pacific Railroad Co.*, 78 F.3d 285, 290 (7th Cir.1996) (discussing environmental statute which "impose[d] strict liability on an owner of property based merely on ownership without regard to what actions the owner took on the property to cause pollution."). For example, under the common law of many jurisdictions, a party engaged in "abnormally dangerous" or "ultrahazardous" activity that results in harm (such as engaging in blasting with dynamite in a residential area) may be held strictly liable, even though the party engaged in the activity exercised due care to prevent the harm. *See, e.g., Opal v. Material Service Corp.*, 9 Ill.App.2d 433, 133 N.E.2d 733 (Ill.1956); *see also Restatement (Second) of Torts* §§ 519 & 520 (1977).[7]

The rationale for strict liability is most often stated in policy terms, and specifically, *economic* terms. As the California Supreme Court explained in *Greenman v. Yuba Power Products, Inc.*, a landmark products liability decision, "[t]he

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[7] Even jurisdictions that accept the doctrine of strict liability for "abnormally dangerous" or "ultrahazardous" activities apply the doctrine cautiously, recognizing that application of the doctrine is limited by the many factors set forth in § 520 of the *Restatement (Second) of Torts*.

purpose of strict liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves." 59 Cal.2d 57, 63, 27 Cal.Rptr. 697, 377 P.2d 897, 901 (1963). In jurisdictions that recognize the doctrine of strict liability for defective products, a company which manufactures a faulty product and places it in the stream of commerce is *presumed* to be legally responsible if harm results from the use of that product, unless the defendant can establish a recognized defense such as assumption of the risk or misuse of the produc.. Louis R. Frumer, et al. 2 *Products Liability* § 8.01 (1997).[8] Strict liability literally *shifts the burden of proof* from the plaintiff to the defendant, reflecting a *policy* judgment that manufacturers, as a general rule, should bear the *costs* associated with defective products that cause harm.

As discussed below, I am convinced that the same cost-shifting rationale which may be argued to support a theory of strict liability for manufacturers of defective products (or those who engage in ultrahazardous activities such as blasting with dynamite) does not justify making employers "strictly liable" for the seemingly intractable *social* problem of sexual harassment. In my view, therefore, the adoption of strict liability in the employment context is not only contrary to agency principles, it also represents a novel, ill-advised, and harmful extension of the doctrine of strict liability that will

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[8] The defenses available to a defendant-manufacturer in a strict products liability action vary from jurisdiction to jurisdiction. There are jurisdictions, for example, that recognize a defense "if a machine, drug, or other product was designed or constructed by a producer in conformity with the 'state of the art' at the time possession was surrendered." W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 99 (Fifth ed.1984).

have deep and lasting social and economic consequences. Policy decisions of this magnitude have traditionally been left to the legislative branch of Government, and should remain the province of the people's elected representatives. In fact, Congress has not even *addressed* the issue of an employer's liability for sexual harassment, much less indicated that employers should be held strictly liable under a "cost-shifting" theory. Until such time as Congress—the Nation's true legislature—has spoken on this question, it would be more proper for us to refrain from imposing the far- reaching standard of strict liability by judicial edict.

C. *Critique of Strict Liability Theories*

Before analyzing the strict liability theories outlined by **Judges Posner**, **Flaum**, **Easterbrook**, and **Diane Wood**, let us initially define the term "agency principles." Our duty is to *interpret* the common law of agency, not to *make* new law. We therefore look to the principles set forth in the *Restatement (2d) of Agency*, which was cited in the *Meritor* decision, and in particular § 219 of the *Restatement*. As the trial judge in *Jansen* explained, § 219 delineates three potential theories for holding employers liable for the sexual harassment of their employees:

> **[1]** Section 219(1) holds employers responsible for torts committed by their employees *within the scope of their employment*. . . . **[2]** Under § 219(2)(b), masters are liable for their own negligence or recklessness; in a harassment case, this is typically negligent failure to discipline or fire, or failure to take remedial action upon notice of harassment. **[3]** Finally, under § 219(2)(d), if the servant relied upon apparent authority or was aided by the agency relationship, the master is required to answer.

Jansen, 895 F.Supp. at 1061 (quoting *Bouton v. BMW of N. Am., Inc.*, 29 F.3d 103, 106 (3d Cir.1994)). With respect to

the first of these three theories (*respondeat superior liability*), it is crucial to recognize that:

> The liability of an employer for torts committed by its employees—without any fault on his part—*when they are acting within the scope of their employment*, the liability that the law calls "*respondeat superior*," *is a form of strict liability*. It neither requires the plaintiff to prove fault on the part of the employer nor allows the employer to exonerate himself by proving his freedom from fault.

Konradi v. United States, 919 F.2d 1207, 1210 (7th Cir.1990) (emphasis added).

1. *Judge Easterbrook's Approach to Employer Liability*

Judge Easterbrook and **Judge Wood** are of the opinion that state rather than federal law should define the parameters of an employer's liability under Title VII, although none of the parties have urged us to take this curious and novel (indeed, unprecedented) approach. Out of the vast constellation of Title VII cases decided by the federal courts, including those that have addressed the issue of employer liability, I have been unable to locate a *single* precedent that supports the unique position of **Judges Easterbrook** and **Wood** on this choice of law question.[9] In fact, *Meritor*

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[9] Indeed, by adopting an agency standard independent of state law (i.e., negligence), our own decisions have implicitly recognized that the question of employer liability for sexual harassment under Title VII is a matter of *federal* common law. Although **Judge Easterbrook** has participated in some of these decisions, he has not to date even hinted in dicta, much less unequivocally stated, that agency principles in Title VII cases must be derived from state law. *See, e.g., Zimmerman, supra* (employer is not liable for negligence if it lacked knowledge of the alleged harassment). Nor, until today, has **Judge Wood** advocated such a rule. In fact, **Judge Wood's** panel opinion in *Ellerth* analyzed "general agency cases," including state and federal precedents from across the country, and

provides a strong refutation of my colleagues' position, for the Supreme Court in *Meritor* did not qualify or limit the "agency principles" that federal trial courts were to "look to . . . for guidance," much less require that "agency principles" be derived from state law. 477 U.S. at 77.[10]

Judge Easterbrook presents a somewhat abridged version of the Supreme Court's recent decision in *Atherton v. FDIC*, 117 S.Ct. 666, 136 L.Ed.2d 656 (1997), by citing that case for the proposition that "[w]hen a federal statute is silent, we obtain the necessary rule from state law, unless application of state law would undermine a federal norm." Easterbrook Op. at pp. 140-141. *Atherton* does state that "normally, when courts decide to fashion rules of federal common law, the guiding principle is that a significant conflict between some policy or interest and the use of state law . . . must first be specifically shown." *Id.* However, *Atherton* also makes clear that this "guiding principle" is *only* applicable to the creation of " 'federal common law' *in the strictest sense*, i.e., a rule of decision that amounts, *not simply to an interpretation of a federal statute* . . . but, rather, to the judicial 'creation' of a special federal rule of decision." *Id.* (emphasis added). Similarly, in *Northwest Airlines, Inc. v. Transport Workers Union*, the Court noted that:

> *In almost any statutory scheme, there may be a need for judicial interpretation of ambiguous or incomplete provisions. But the authority to construe a statute is*

there is no suggestion in that opinion that the relevant agency-law principles were to be drawn from the law of a particular state (i.e., Illinois). *Ellerth v. Burlington Industries, Inc.*, 102 F.3d 848, 855-59 (7th Cir.1996), *reh'g granted and decision vacated*, 102 F.3d at 863.

[10] Nor has the High Court looked to state law in more recent cases involving the interpretation of Title VII terminology, as **Judge Manion** points out in his concurrence. Manion Op. at p. 166.

> *fundamentally different from the authority to fashion a new rule or to provide a new remedy which Congress has decided not to adopt.*

451 U.S. 77, 79, 101 S.Ct. 1571, 67 L.Ed.2d 750 (1981) (emphasis added); *see also United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 593, 93 S.Ct. 2389, 37 L.Ed.2d 187 (1973) ("[T]he inevitable incompleteness presented by all legislation means that interstitial federal lawmaking is a basic responsibility of the federal courts."). I agree with **Chief Judge Posner** that "[d]eciding what agency principles shall govern liability under a liability-creating statute such as Title VII is not free-wheeling common-law rule-making; it is *filling a statutory gap*, [which is] a standard office of *interpretation*." Posner Op. at p. 35.

Even if I were to agree with **Judge Easterbrook**'s premise, for purposes of argument, that deciding the question of employer liability requires something more than traditional statutory interpretation, federal common law rules governing employer liability serve the basic "policy or interest" of uniformity. Interposing the statutes and decisional law of the fifty states, as proposed by **Judges Easterbrook** and **Wood**, would make a crazy-quilt of the law and thus grievously undermine the interest in uniformity. Such an approach would make it most difficult, if not impossible, for an employer with plants in more than one state to comply with federal law, obviously necessitating that employers retain knowledgeable local counsel in several states, or even all of them.[11] The Supreme Court has recognized that federal courts may "fill the interstices of federal remedial schemes with uniform federal rules . . . when the scheme in question

[11] Presumably these heightened costs of compliance—like those associated with a strict liability standard—would be passed on to workers and consumers.

evidences a distinct need for nationwide legal standards." *Kamen v. Kemper Financial Svcs., Inc.*, 500 U.S. 90, 97-98, 111 S.Ct. 1711, 114 L.Ed.2d 152 (1991); *see also O'Melveny & Myers v. FDIC*, 512 U.S. 79, 88, 114 S.Ct. 2048, 129 L.Ed.2d 67 (1994) (recognizing "federal interest . . . in uniformity"); *Wilson v. Garcia*, 471 U.S. 261, 266-69, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985) (resort to state law would result in "conflict, confusion, and uncertainty" concerning the appropriate statute of limitations in § 1983 cases). As **Judge Manion** points out most persuasively, Manion Op. at p. 166, the Court underscored the need for uniformity in *Community for Creative Nonviolence v. Reid*, 490 U.S. 730, 109 S.Ct. 2166, 104 L.Ed.2d 811 (1989), which stated:

> In past cases of statutory interpretation, when we have concluded that Congress intended terms such as 'employee,' 'employer,' and 'scope of employment' to be understood in light of agency law, we have relied on the *general common law of agency, rather than on the law of any particular State*, to give meaning to these terms. . . . *This practice reflects the fact that federal statutes are generally intended to have uniform nationwide application.*

Id. at 740 (emphasis added) (quotation omitted).

Judge Easterbrook suggests that adopting uniform federal rules of decision for employer liability under Title VII is somehow contrary to *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), because "there is no free floating [federal] common law." Easterbrook Op. at p. 140. However, "[s]ince *Erie*, no decision of [the Supreme] Court has held or suggested that [the lower federal courts must] borrow[ ] state law to fill gaps in federal substantive statutes." *DelCostello v. Teamsters*, 462 U.S. 151, 160, 103 S.Ct. 2281, 76 L.Ed.2d 476 (1983) (no "mandatory rule that

we apply state law in federal interstices."); *see also Sola Electric Co. v. Jefferson Electric Co.*, 317 U.S. 173, 176, 63 S.Ct. 172, 87 L.Ed. 165 (1942). As Justice Jackson once explained:

> In some cases [a federal court sitting in a non-diversity case] may see fit for special reasons to give the law of a particular state highly persuasive or even controlling effect, but in the last analysis its decision turns upon the law of the United States, not that of any state. *Federal law is no juridical chameleon, changing complexion to match that of each state wherein lawsuits happen to be commenced.* . . . It is found in the federal Constitution, statutes, or common law. Federal common law implements the federal Constitution and statutes and is conditioned by them. Within these limits, *federal courts are free to apply the traditional common-law technique of decision and to draw upon all the sources of the common law in cases such as the present.*

D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447, 471, 62 S.Ct. 676, 86 L.Ed. 956 (1942) (Jackson, J., concurring) (emphasis added).

I am in full agreement with the majority that the question of employer liability under Title VII should be treated as a matter of *federal* law, and that we should reject what **Judge Manion** aptly labels "a 50-state standard wrapped in local common law." Manion Op. at p. 165. The majority's approach, in contrast with that of **Judge Easterbrook** and **Judge Wood**, is faithful to the principle that "[l]egal rules which impact significantly upon the effectuation of federal rights must . . . be treated as raising *federal* questions." *Burks v. Lasker*, 441 U.S. 471, 476, 99 S.Ct. 1831, 60 L.Ed.2d 404 (1979).

2. *Judge Wood's Approach to Employer Liability*

Judge Wood (joined by **Judges Easterbrook** and **Rovner**) purports to follow "general principles of traditional agency law,"[12] and insists that her approach "is not the 'strict liability' that the Supreme Court rejected in *Meritor*." Wood Op. at p. 171 n. 2. However, a careful reading of her entire opinion clearly demonstrates that she has seen fit to go far beyond *Meritor* by endorsing an overly broad strict liability standard that is based upon an unprecedented and (I believe) incorrect expansion of the *respondeat superior doctrine*.

Judge Wood asserts, without support in case law, that the "proper inquiry" in determining whether an employer may be held liable under the doctrine of *respondeat superior* is "whether the supervisor, acting at least in part with the purpose of serving the employer, committed the acts of harassment as he exercised the authority (actual or apparent) the employer conferred on him: hiring, firing, assigning work, disciplining other employees for harassing behavior, and the like." Wood Op. at p. 188 (emphasis added). I have two principal objections to the way Judge Wood has re-fashioned the *respondeat superior* doctrine for purposes of Title VII:(1) her analysis greatly expands the concept of "scope of employment," and (2) it fails to make clear who is (and is not) a "supervisor."

I agree with **Judge Wood** that in determining the scope of an employer's *respondeat superior* liability under § 219,

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[12] Indeed, there are isolated portions of **Judge Wood**'s opinion that actually do reflect "traditional agency law" and even suggest that she is advocating a negligence standard. For example, **Judge Wood** writes that "if the supervisor uses neither actual nor apparent authority to take the employment action, then the employer should be liable only if the plaintiff shows that the employer *knew or should have known* about the harassing behavior." Wood Op. at p. 171 (emphasis added).

"[t]he first question . . . should be whether the supervisor's action was *within the scope of his employment*." Wood Op. at p. 186 (emphasis added). But **Judge Wood**'s definition of "within the scope of employment" is so broad and all-inclusive that in effect it imposes "automatic" or strict liability, contrary to the *Meritor* decision. **Judge Wood** argues that liability must be strict if a supervisor harasses another employee "*as* he exercise[s]" the actual or apparent authority delegated to him. The relevant conduct, according to **Judge Wood**, is "not the act of harassment," but instead the "broader course of action," i.e., the supervisor's performance of authorized duties. Wood Op. at 188. *I disagree*. If we were to adopt this reasoning, the legal phrase "within the scope of employment" would in effect become meaningless, for it would encompass a panoramic range of conduct, whether authorized or not. Without defined parameters, the phrase "within the scope of employment" no longer serves to *limit* the reach of *respondeat superior* liability and becomes a kind of legal pit of quicksand, drawing in all manner of activity. Applying **Judge Wood**'s attenuated logic, a company could be held liable if its agent committed any kind of *unauthorized* conduct imaginable, short of rape,[13] so long as the conduct somehow occurred "as [the supervisor] exercised" some kind of *authorized* job duty. For example, a television station could be held liable if one of its news reporters "lost his cool" and physically assaulted a person while recording an interview. Such an act would give rise to liability under **Judge Wood**'s theory because it

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[13] In a supposed qualifying statement that is of no value, **Judge Wood** acknowledges that "severe forms" of sexual harassment, such as violent rape, "may be so far from the norm that the employer should not be held liable in the absence of negligence." Wood Op. at p. 189 (referring to *Martin v. Cavalier Hotel Corp.*, 48 F.3d 1343 (4th Cir.1995)).

occurred "as" the reporter was reporting on news (authorized activity), but *respondeat superior* liability should not be imposed on these facts because the conduct in question clearly falls outside the scope of the reporter's legitimate duties and is not motivated by a purpose to serve the employer. **Judge Wood**'s analysis converts § 219's theory of *respondeat superior* (or "the master answers") into a far more all-inclusive and unbending theory of strict liability or "guilt by association."

The concepts advisedly set forth in § 219(1) of the Restatement are not so elastic. An employee's conduct (i.e., sexual harassment) "is *not* within the scope of employment if it is different in kind from that authorized . . . or too little actuated by a purpose to serve the [employer]." *Restatement (2d) Agency* § 228(2) (emphasis added); *see also Denliger v. Brennan*, 87 F.3d 214, 216 (7th Cir.1996) ("intentional torts outside the scope of employment usually do not lead to an employer's vicarious liability"); *Joel v. Morrison*, 6 C. & P. 501, 172 Eng. Rep. 1338 (1834) (servant's conduct may not be imputed to the master when servant is "on a frolic of his own."). As Judge Bork observed when dissenting from the D.C. Circuit's decision in *Meritor*, "[i]ntentional torts involving sexual escapades almost never result in employer liability because they are *personally motivated*." *Vinson v. Taylor*, 760 F.2d 1330, 1332 n. 6 (Bork, J., dissenting) (emphasis added). Thus, a rule making employers liable for such escapades is "at odds with traditional practice." *Id.* **Judge Wood** asserts that the language in *Restatement* § 228, quoted above, "imposes a meaningful limitation on the scope of employment, thereby ensuring that employers will not be held liable for the 'frolics and detours' of their employees or for acts that are unforeseeable to the employer." Wood Op. at p. 187. Yet for **Judge Wood**, it appears to be a given that unlawful *quid pro quo* harassment "will almost always fall

within the scope of [a] supervisor's employment and thus result in employer liability" because it occurs so often "as" (or while) the supervisor is performing authorized duties. Wood Op. at pp. 169, 188.

Judge Wood's boundless definition of "scope of employment" contrasts sharply with the traditional understanding of that term. As set forth in a leading treatise on tort law, "scope of employment":

> refers to those acts which are *so closely connected* with what the servant is employed to do, and so *fairly and reasonably incidental to it*, that they may be regarded as methods, even though quite improper ones, of carrying out the objectives of the employment.

W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 70, at 502 (5th ed.1984). While the general rule of *respondeat superior* embodied in § 219 holds that an employer may be liable for the tortious conduct of employees acting within the scope of their employment, it is crucial to note that:

> not every act which an agent or servant may do *while* he is in the place appointed for the service, or *during* the time in which he is engaged in the performance, can be deemed to be *within the course of employment*, or *within the scope of the authority*. The test lies deeper than that; it inheres in the relationship which the act done bears to the employment. *The act cannot be deemed to be within the course of employment unless, upon looking at it, it can fairly be said to be a natural, not disconnected and not extraordinary, part or incident of the service contemplated.*

Hibma v. Odegaard, 769 F.2d 1147, 1168 (7th Cir.1985) (Coffey, J., dissenting) (quoting *Cameron v. City of Milwaukee*, 102 Wis.2d 448, 456, 307 N.W.2d 164 (1981)).

The *Restatement* makes clear that "not all physical acts of the kind authorized performed within the time and at the place of service are within the scope of employment, since only those which the servant does in some part for the purpose of giving service to the master are included." Restatement (Second) of Agency § 228, cmt. (a). If an employee has " 'stepped aside from the business of his principal to accomplish an independent purpose of his own,' " far removed from the scope and nature of his duties and responsibilities, the employer may not be held liable under the doctrine of *respondeat superior*. *Hibma*, 769 F.2d at 1168 (quoting *Linden v. City Car Co.*, 239 Wis. 236, 239, 300 N.W. 925 (1941)).

In addition to broadening the meaning of "scope of employment," **Judge Wood**'s analysis of *respondeat superior* liability for sexual harassment by supervisors fails to adequately address the definition of "supervisor." **Judge Wood** describes a supervisor as one who "exercise[s] the authority (actual or apparent) the employer conferred on him: hiring, firing, assigning work, disciplining others for harassing behavior, and the like." This "definition" of supervisor raises a number of questions: Is an employee who exercises any *one* of the duties listed by **Judge Wood** a "supervisor" for purposes of imposing strict liability? May an employee be deemed a supervisor even if the authority delegated to him (over firing, for example) is shared with others? And what activities fall within **Judge Wood**'s catch-all phrase "and the like," which follows her list of supervisory duties? If we are to lock ourselves into a strict liability standard for supervisory cases, as **Judge Wood** proposes, it is imperative that we define "supervisor" most precisely.

Our cases interpreting the statutory definition of "supervisor" in the National Labor Relations Act, 29 U.S.C. § 152(11) ("NLRA") have examined the meaning of this term

in some detail and recognized that "*[s]upervision in the elementary sense of directing another's work*" does not suffice to make an employee a "supervisor." *N.L.R.B. v. Res-Care, Inc.*, 705 F.2d 1461, 1465 (7th Cir.1983). Rather, a supervisor "must have *authority over another's job tenure and other conditions of employment.*" *Id.*; *see also N.L.R.B. v. Winnebago Television Corp.*, 75 F.3d 1208, 1213 ("The test of a supervisor under § 152(11) is *whether his judgment was dispositive in personnel decisions.*"). The need to define "supervisor" with precision—and to provide some meaningful, common-sense limitations on who may be deemed a "supervisor"— is even more imperative in cases of sexual harassment because Title VII, unlike the NLRA,[14] fails to provide a statutory definition of this term. It would be helpful if Congress filled in this definitional gap in the law, particularly because judicial opinions expanding employer liability have relied so heavily on the distinctions between harassment by supervisors and harassment that occurs among co-workers. In the absence of a statutory or judicial definition setting forth parameters for the term "supervisor," sexual harassment plaintiffs will obviously have an incentive to characterize all alleged harassers as "supervisors," even in

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[14] The NLRA expressly distinguishes "supervisors" from other employees, providing, in relevant part, that:

> The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

29 U.S.C. § 152(11).

cases where the wrongdoer lacked significant authority over the plaintiff's hiring, firing, or conditions of employment.

In defining "supervisor" and addressing what conduct does (and does not) fall "within the scope of employment," we should recognize and understand that most employees, including those labeled as "supervisors," are subordinate to a number of other, higher levels of management, and lack the authority to make personnel decisions regarding whom to hire, fire, or promote. Even an employee who is just above the bottom of the employment "chain of command" may have the singular authority to "assign[ ] work" to other employees, which according to **Judge Wood** is one of the duties that transforms an employee into a "supervisor" for purposes of Title VII liability. For example, a "sanitation engineer" employed by a garbage and trash collection company may be charged with overseeing a crew of two or three workers assigned to the same truck, and authorized to "assign work" (i.e., decide on a given day who will empty trash bins and who will operate the truck). However, just because the employee has been authorized to perform such minimal duties, or just because his job description, for payroll purposes, classifies him as a "supervisor," does not mean that he qualifies as a decision-maker in the corporate enterprise, much less does he fall within the upper echelon of responsibility at the firm.

A supervisor should only be considered as an agent of the firm when he is truly vested with more than a mere modicum of authority to act for and on behalf of his principal and when he is acting *to advance the principal's interests*, as when an individual with authority to hire and fire, promote and demote another employee actually exercises that authority, and believes that his actions are in the best interests of the firm. **Judge Wood** in my view is grasping at a very thin reed of "agency law" if she wishes to hold an organization strictly

liable for an employee's intentional torts merely because that employee occupied some limited type of supervisory role within the firm, perhaps very far down in the company's hierarchy. For example, an individual classified as a supervisor of the housekeeping services detail within a corporation acts "within the scope of his employment" when he gives directions to his cleaning staff about what cleaning compound to use when tidying up the premises, or which brand of brush or vacuum to use, or when he directs that they sweep the floors at 7:30 PM rather than 8:30 PM. Would **Judge Wood** hold a newspaper *strictly liable* if an assistant city editor, in a fit of anger, physically assaults or even goes so far as to shoot and kill one of the reporters whose work he supervises? Should a correctional facility be held *strictly liable* if it allows a prisoner extra compensation for directing the activities of a clean-up crew and the supervisor/prisoner sexually assaults one of the inmates under his supervision? All of these intentional and unauthorized acts by "supervisors" represent a departure from the employee's legitimate supervisory role and therefore should not be imputed to the principal under the theory of *respondeat superior*. Yet under **Judge Diane Wood**'s all-expansive interpretation of § 219(1) and her imprecise definition of the term "supervisor," liability could be imposed in each of these hypothetical situations, so long as the "supervisor's" misconduct occurred during the course of performing authorized duties.

Turning to the facts of the cases under consideration, the alleged conduct of Jansen's harasser (Antoni) and Ellerth's (Slowik) fell outside the scope of their employment. As the Tenth Circuit observed in *Hicks v. Gates Rubber Co.*, "sexual harassment simply is not within the job description of *any* supervisor or any other worker in *any* reputable business." 833 F.2d 1406, 1418 (10th Cir.1987) (quotation omitted).

Although **Judge Wood** seemingly acknowledges the limitations on *respondeat superior* liability by stating that the supervisor must "act[ ] at least in part with the purpose of serving the employer" in order for the employer to be liable, there is not a scintilla of evidence in either of the respective court records under review that the conduct of either Antoni or Slowik was motivated by a purpose to serve their employer. Like all of my colleagues on this court, I am unalterably opposed to true sexual harassment, which is vulgar, repulsive and uncalled for under any circumstances. However, I think it is obvious that those who engage in sexual harassment are driven by *personal* motives alone that have nothing to do with furthering the aims and goals of their employers. As **Chief Judge Posner**, writing for this court, noted in a race discrimination case:

> [H]arassment is an intentional wrong, and the doctrine of *respondeat superior* makes an employer liable only for those intentional wrongs of his employees that are committed in furtherance of the employment; the tortfeasing employee must think (however misguidedly) that he is doing the employer's business in committing the wrong. It would be the *rare* case where . . . harassment against a co-worker could be thought by the author of the harassment to help the employer's business.

Hunter v. Allis-Chalmers Corp., 797 F.2d 1417, 1421 (7th Cir.1986) (emphasis added). In his scholarly review of post-*Meritor* sexual harassment law, Michael J. Phillips, a Professor of Business Law at Indiana University, has taken note of **Judge Posner**'s observations in *Hunter* concerning the *intentional* nature of harassment, and he has argued cogently that "[e]mployers should virtually *never* be liable for sexual harassment if *respondeat superior* is the agency principle of choice *because such behavior is rarely, if ever, within the scope of employment.*" *Employer Sexual*

Harassment Liability Under Agency Principles: A Second Look at Meritor Savings Bank, FSB v. Vinson, 44 Vand. L. Rev. 1229, 1245 (1991) (emphasis added). An employee who sexually harasses another employee has not only violated the law, but in most cases (including the two before us today) he has likewise acted contrary to company policy. Because the harasser has clearly "stepped aside from the business of his principal" and acted beyond the "scope of his employment," his actions cannot be attributed to his employer under the theory of *respondeat superior* as set forth in § 219(1).

Judge Wood's opinion, with its elastic interpretation of the *respondeat superior* doctrine, represents a most dramatic expansion of employer liability. Her opinion is all the more sweeping because it goes on to suggest that we adopt a uniform mode of analyzing employer liability in *all* sexual harassment cases involving supervisors. Wood Op. at pp. 172-178. Not content to limit her version of strict liability to so-called *quid pro quo* cases, **Judge Wood** (joined by **Judges Easterbrook** and **Rovner)** would *also* extend that standard into each and every case in which a supervisor is alleged to have created a hostile work environment.[15] **Judge Wood**'s *broad, all-inclusive, boundless* net of strict liability, reaching *quid pro quo* and hostile work environment cases alike, finds

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[15] The differences between these two kinds of sexual harassment are discussed at greater length below.

no direct support in case law from any circuit,[16] much less the Supreme Court. Those circuits that have adopted a strict liability standard limit the application of that standard to *quid pro quo* cases only, as **Judge Wood** concedes. Wood Op. at p. 177; *Nichols v. Frank*, 42 F.3d 503, 513 (9th Cir.1994); *Bouton v. BMW of North America*, 29 F.3d 103, 106 (3d Cir.1994); *Sauers v. Salt Lake County*, 1 F.3d 1122, 1127 (10th Cir.1993); *Kaufmann v. Allied Signal, Inc.*, 970 F.2d 178, 183 (6th Cir.1992); *Steele v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311 (11th Cir.1989).

Quid pro quo harassment does not fall "within the scope" of a supervisor's employment, as Judge Wood argues, because such conduct departs drastically from the supervisor's authorized duties and is not motivated by a purpose to serve the employer. Similarly, acts which create a hostile work environment (such as unwelcome sexual advances, touching, remarks which suggest an animus towards women, and the like) fall far afield from the scope of a supervisor's employment-related duties, as interpreted by the courts, and bear *no* relation to any legitimate activity that the supervisor is authorized to perform. As **Judge Wood** concedes in a footnote to her opinion, Wood Op. at p. 178, n. 4, the Eleventh Circuit recently *rejected* her view that employers may be held strictly liable under agency principles for acts by a supervisor which contribute to a hostile work environment. *Faragher v. City of Boca Raton*, 111 F.3d 1530

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[16] **Judge Wood** claims that *Karibian v. Columbia Univ.*, 14 F.3d 773, 780 (2d Cir.1994), "suggest[s]" that the Second Circuit has "moved toward [s]" her position. Wood Op. at p. 178. However, **Judge Wood** has not cited (nor am I aware of) a single opinion which directly supports her view that employers should be held strictly liable in *all* cases involving supervisors. In fact, this position was very recently repudiated by the Eleventh Circuit in *Faragher v. City of Boca Raton*, 111 F.3d 1530 (11th Cir.1997) (en banc), as discussed below.

(11th Cir.1997) (en banc). In *Faragher*, the plaintiff, a female lifeguard employed by the City of Boca Raton, Florida, was allegedly subjected to "offensive comments, gestures, and touching" by two of her supervisors. Ms. Faragher brought suit against the city under Title VII, arguing that the municipality as employer should be held vicariously liable for the hostile work environment created by the two supervisors. In rejecting Faragher's claim, the Eleventh Circuit properly applied the principles of agency, noting that when an "agent steps outside of his employment to do some act for himself which is not connected to his employer's business," then "the act is not within the scope of his employment." *Id.* at 1536. In other words, "if the agent acts from *purely personal motives* [i.e., sexual harassment], *he is usually considered to have departed from his employment and his employer is not liable*." *Id.* at 1537. The Court concluded that the harassers' offensive language, gestures and touching provided an "archetypical example of employees stepping outside of the scope of their employment and seeking to further personal ends." *Id.* In line with its proper understanding of agency law, the Eleventh Circuit, in an en banc decision, held that the city could not be held liable for the harassing conduct under a theory of vicarious liability. *Id.*

I am in agreement with the Eleventh Circuit that if a supervisor or any other employee "acts from *purely personal motives*," as is inevitably the case in a hostile work environment scenario, he has "*departed from his employment and his employer is not liable*" under the principle of *respondeat superior*. *Id.* A majority of this Court agrees that strict liability is *not* warranted in hostile work environment cases, Per Curiam at p. 7, and the dearth of supporting case law for a "blanket rule" (extending strict liability to *all* cases involving supervisors) should certainly give pause to **Judges**

Wood, **Easterbrook**, and **Rovner**, who are in a distinct minority on this issue.

3. *Judge Flaum's Approach to Employer Liability*

Like **Judge Wood**, **Judge Flaum** believes that "[a]gency law [and specifically § 219] supports the imposition of vicarious liability upon employers for supervisory *quid pro quo* harassment." Flaum Op. at p. 10. **Judge Flaum** reasons that when a supervisor uses the authority delegated to him to effectuate a *quid pro quo*, " 'the supervisor, by definition, acts as the company.' " Flaum Op. at p. 12 (quoting *Steele*, 867 F.2d at 1316). Under this approach, the morally culpable harasser and the employer are treated as if they had somehow "merg[ed] into a single entity,"[17] *in spite of the fact that the employer lacked any knowledge of the harassment and took reasonable measures to prevent such conduct in the workplace*. To my way of thinking, **Judge Flaum**'s equating of employer and harasser is just a different colored facade on the same legal structure erected by **Judge Wood**, i.e., the theory that a "supervisor" (loosely defined) acts within the "scope of employment" (broadly defined) when he engages in *quid pro quo* harassment. Despite their differences, **Judge Flaum** and **Judge Wood** agree that an employer may be held strictly liable for quid pro quo harassment by a supervisor. I disagree with that proposition as a matter of both law and logic.

Although Judge Flaum advocates a strict liability standard for supervisory, *quid pro quo* cases, he states that the standard in hostile work environment cases should "remain at

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[17] The EEOC as *amicus* in *Ellerth* argued before the *en banc* panel that the issue of whether the employer has notice of the harassment "doesn't matter" because the theory underlying strict liability is that the supervisor and the employer have *somehow* "merge[d] into a single entity."

negligence." Flaum Op. at p. 24. Thus, **Judge Flaum**'s approach is not quite as drastic as **Judge Wood**'s, in that it does not propose strict liability for hostile work environment cases. Nevertheless, **Judge Flaum** asserts that employers have a "heightened duty of care" when it comes to preventing hostile work environment harassment by supervisors. Flaum Op. at p. 25. He does not define the meaning of this "heightened duty of care" standard, although he states that the "remedial goals" of Title VII require an employer to take "systemic and proactive" steps to prevent harassment by supervisors. Flaum Op. at p. 15. **Judge Flaum** also states (and I agree with his statement) that companies should "foster a culture in which harassment is not tolerated," Flaum Op. at p. 17, but this general statement fails to define or delineate his proposed standard, much less outline what employers must do *in addition* to the already widespread (and advisable) practice of adopting and publishing an anti-harassment policy and procedures for reporting harassment. If **Judge Flaum**'s "heightened duty of care" standard were adopted, appellate courts across the country would soon find themselves in a quagmire, plagued by litigants who would (understandably) ask them to define and elaborate upon a standard that comports with neither traditional negligence nor strict liability. I am unable to join **Judge Flaum**'s proposed modification of the traditional negligence standard for hostile work environment cases, and I am pleased to note that the court's *per curiam* opinion avoids the ambiguities of his "heightened duty of care" standard. I join with the *per curiam* opinion's straightforward holding that "the standard for employer liability in cases of hostile work environment sexual harassment by a supervisor is *negligence, not strict liability*. . . ." Per Curiam Op. at p. 7 (emphasis added).

4. *Judge Cudahy's Approach to Employer Liability*

Unfortunately, I do not find **Judge Cudahy**'s reflections upon **Judge Flaum**'s "heightened duty of care" standard particularly helpful; indeed, his analysis raises more questions than it answers. I will not address **Judge Cudahy**'s suggestion that employers in supervisory hostile work environment cases should be held to the same standard as "packers of parachutes or open heart surgeons," Cudahy Op. at p. 30, for in my view neither heart surgery nor parachute-manufacturing are even remotely analogous to sexual harassment.

Judge Cudahy apparently believes that "vulnerable females" will not "feel free to report [sexual harassment] to the company," even in those firms and business enterprises that have a policy against sexual harassment and established procedures for reporting the same. Cudahy Op. at pp. 29-30. In fact, **Judge Cudahy** goes farther and asserts, for reasons unexplained, that we ought to *presume* that female victims of harassment "could not reasonably be expected to report their problems" using such grievance procedures. I disagree with his contention that female victims of harassment are always "vulnerable," nor should we assume that women (who have properly and successfully campaigned to be treated as equals in the workplace) are any less capable than men of sharing in the task of both monitoring and reporting sexual harassment. Furthermore, I am concerned that what **Judge Cudahy** may really be saying is that the existence of a sexual harassment policy (and reporting procedures) should have *no* bearing on employer liability in supervisory cases. An employer faced with such judicial commentary on the irrelevance of sexual harassment policies could well ask: Why establish, much less publish, a policy?

Another problem with **Judge Cudahy**'s opinion is his assertion that whenever a sufficiently hostile or abusive environment exists (i.e., whenever the harassment is severe or pervasive enough to be actionable), there should be a legal *presumption* that the employer had "constructive notice" (i.e., "should have known") of the harassment. Cudahy Op. at p. 31. Here I note that **Judge Cudahy** is improperly relying upon the reasoning set forth in the district court's opinion in *Faragher*, 864 F.Supp. 1552, 1563 (S.D.Fl.1994), which the Eleventh Circuit on appeal specifically and emphatically rejected in its *en banc* opinion. The Eleventh Circuit noted that:

> [W]e do not agree with the district court's apparent belief that simply because conduct is pervasive enough to create an abusive work environment the employer should be charged with knowledge of the conduct. *The question of notice to the employer is distinct from the question of the environment's abusiveness. Thus, the district court erred to the extent that it conflated the two inquiries.*

Faragher, 111 F.3d at 1538. As recognized by the en banc court in Faragher, the traditional negligence standard (as opposed to the "heightened" version advocated by **Judges Flaum** and **Cudahy**) does in fact presently provide that an employer may be held liable if it knew or *should have known* about harassment in its workplace. In order that we might keep the two inquiries separate and thus avoid confusion, I agree with the Eleventh Circuit that the question of whether a specific employer under a particular set of circumstances "should have known" of harassment must remain separate

and distinct from that of whether the harassment is of such a nature as to be actionable.[18]

5. *The Need to Distinguish Quid Pro Quo and Hostile Work Environment Harassment*

I wish to note a final and very crucial area of disagreement with **Judge Flaum**'s opinion as it relates to strict liability. As previously noted, **Judge Flaum** regards a *quid pro quo* as an essential prerequisite to imposing strict liability, and observes that "defining an actionable *quid pro quo* . . . is central to the liability standard." Flaum Op. at p. 17. However, *neither* of the cases before us, from a factual point of view, involved a true *quid pro quo* as previously defined in our case law.[19] **Judge Flaum** has expanded the definition of *quid pro quo* harassment, possibly even beyond the bounds of reasonableness, in order to make the facts of *Jansen* come within the purview of a *quid pro quo* theory. **Judge Wood**, similarly, adopts an elastic approach to the definition of *quid pro quo* harassment, but this tactic is less crucial to her overall argument because in her view strict liability is the proper standard in any and all supervisory cases.

Quid pro quo harassment, as **Judge Diane Wood** noted in the very recent case of *Bryson v. Chicago State University*, "occurs in situations where submission to sexual demands is made a condition of *tangible* employment benefits." 96 F.3d

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[18] An employer can know about "harassment" that is not actionable as a matter of law. Conversely, harassment more frequently than not takes place without the employer's knowledge. Thus, as a matter of logic, it makes sense to keep these two inquiries separate.

[19] As noted in Section III of this opinion, I am confident that both Jansen and Ellerth have waived their claims of *quid pro quo* harassment by failing to raise them in their respective EEOC claims or district court complaints.

912, 915 (7th Cir.1996) (emphasis added). Harassment of the *quid pro quo* variety has been described as "the most oppressive and invidious type of workplace sexual harassment" because:

> There can be no justification for requiring a worker to engage in sexual acts in order to obtain a job or job-related benefit, or to avoid a job-related detriment. Most workers subjected to sexual pressure in the workplace have little means of defense—other than the law. For economic reasons, most workers cannot simply abandon their employment—new jobs are hard to find.

Nichols, 42 F.3d at 510. The term *quid pro quo* literally means "something for something." Specifically, as **Judge Rovner** observed in *Dey v. Colt Const. & Development Co.*, *quid pro quo* harassment involves an exchange that "link[s] an *economic* benefit to . . . participation in conduct of a sexual nature." 28 F.3d 1446, 1453 (7th Cir.1994). In order to succeed under a *quid pro quo* theory, according to **Judge Wood**'s opinion in *Bryson*, the plaintiff must demonstrate "what the '*quo*' part of the *quid pro quo* was: [i.e.,] what *tangible* aspect of employment was affected." Bryson, 96 F.3d at 916 (emphasis added).[20] In other words, a plaintiff must establish that she "has suffered a *materially adverse* employment action" for refusing to engage in unwelcome sexual conduct with the harasser. *Id.* (emphasis added).

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[20] In *Bryson*, we confined our analysis to the question of whether the plaintiff had come forward with sufficient evidence of the loss of a "tangible employment benefit" to survive summary judgment on her *quid pro quo* claim (we held that she did). The *Bryson* court noted that in other circuits, an employer may be held liable for *quid pro quo* harassment under a *respondeat superior* theory, if the plaintiff can "link the employer to the actions of the harasser." 96 F.3d at 915. However, we have not to date elaborated upon the scope of *respondeat superior* in Title VII sexual harassment cases involving an alleged *quid pro quo*.

"Materially adverse employment action" can take many forms, but (as "materially" implies) such action must in some manner affect a tangible, economic aspect of the plaintiff's job. To give but one example, this court did not hesitate to find a "*materially adverse employment action*" in the recent *Bryson* case, where the plaintiff, a university professor, alleged that she suffered the loss of her academic title as well as her assignments to various administrative committees within the university after she refused to engage in sexual relations with a university official. *Bryson*, *supra*. We reasoned that both the title and the committee work contributed to the plaintiff's stature within the university administration and were "*tangible employment benefits*" because they "*conferred prestige and [were] important to further professional advancement*." We observed that "[u]niversities have few 'carrots' to dangle in front of tenured faculty members who reach full professorhood," and that the "reward structure" within a university often includes honorary or in-house titles and committee assignments, which can serve as the "building blocks" for a promotion within the university or the attainment of a more substantial position at another academic institution. *Id.*

While "materially adverse employment action" is a broad term, it is not without parameters and limitations established in case law. Specifically, "*a supervisor's mere threat or promise of job-related harm or benefits in exchange for sexual favors does not constitute* quid pro quo *harassment*." *Gary v. Long*, 59 F.3d 1391, 1396 (D.C.Cir.1995) (emphasis added). "*[I]t takes more than saber rattling alone* to impose *quid pro quo* liability on an employer; the supervisor must have *wielded the authority entrusted to him* to subject the victim to *adverse job consequences* as a result of her failure to submit to unwelcome sexual advances." *Id.* (emphasis added).

Hostile work environment harassment, by contrast with the *quid pro quo* variety, occurs "[w]hen the workplace is permeated with 'discriminatory intimidation, ridicule and insult,' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.' " *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993) (quoting *Meritor*, 477 U.S. at 65, 67). Although some of my fellow judges have proposed a dramatic expansion of employer liability under Title VII and have adopted a very elastic approach to *quid pro quo* harassment, I do not understand any of them to argue that we should abandon this circuit's definition of what constitutes actionable hostile work environment harassment. Our decisions have emphasized that "isolated and/or trivial remarks of a sexual nature do not satisfy the definition of sexual harassment," *Rennie v. Dalton*, 3 F.3d 1100, 1107 (7th Cir.1993), *cert. denied*, 510 U.S. 1111, 114 S.Ct. 1054, 127 L.Ed.2d 375 (1994), and that conduct is *not* actionable as sexual harassment if it is "too tepid or intermittent or equivocal to make a *reasonable* person believe that she has been discriminated against on the basis of sex." *Galloway v. General Motors*, 78 F.3d 1164, 1168 (7th Cir.1996) (holding that "safe harbor" exists for "low- level harassment."); *see also Gleason v. Mesirow*, No. 96-1458, slip op. at 21 (7th Cir. June 25, 1997); 1997 WL 365366. Hostile work environment harassment, like *quid pro quo* harassment, is a form of sex discrimination prohibited by Title VII, and obviously is not condoned under our present case law. But the two types of harassment are separate and distinct forms of discrimination and must not be co-mingled if we are to analyze and enforce sexual harassment law with coherence and clarity. In a hostile work environment case, unlike a *quid pro quo* case, the injury to the victim need not be directly linked to a tangible job benefit or detriment. *See*,

e.g., *Baskerville*, 50 F.3d at 430 ("[t]he concept of [hostile work environment] sexual harassment is designed to protect working women from the kind of male attentions that can make the workplace hellish for women.").

Jansen claims that Antoni engaged in *quid pro quo* harassment when, in response to her inquiries about the late filing of her work performance review, he stated "It's on my desk" while he performed a lewd gesture. Under the factual scenario presented in *Jansen*, I cannot agree with **Judge Flaum** that Antoni's alleged conduct is actionable as *quid pro quo* harassment. Flaum Op. at pp. 19, 26. The record reflects that Jansen was the secretary in the defendant company's tooling services department, and she worked primarily for Antoni, the manager of the department. Antoni exercised a measure of control over Jansen's working environment and was expected, as part of his duties, to contribute to the evaluation of the plaintiff's job performance. However, in his role as manager of the tooling services department, Antoni was not entrusted with the unilateral authority to hire or fire Jansen, nor was he the sole individual responsible for reviewing Jansen's performance.[21] *Contrast Highlander v. KFC Nat'l Management Co.*, 805 F.2d 644, 648 (6th Cir.1986) (would only impose strict liability for *quid pro quo* harassment if supervisory employee had "*plenary* authority over hiring, advancement, dismissal, and discipline" of the plaintiff). Since Antoni did not have final authority over personnel matters affecting the plaintiff, there is at least a legitimate question as to whether he was even in a position to engage in *quid pro quo* harassment of Jansen. In other words, I seriously question whether he ought to be classified as a "supervisor," and note again that we lack a clear

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[21] Her performance reviews required the approval of Henry Weil, the Director of Operations at the PCA facility.

definition of this crucial term to guide us in cases of *quid pro quo* sexual harassment.

Moreover, even assuming that Antoni *could have* subjected the plaintiff to *quid pro quo* harassment, the record is clear that he did not *actually* do so. *Antoni never followed up his comment and/or gesture to the plaintiff with adverse job action*, nor did Jansen ever comply with Antoni's alleged unwelcome sexual advances. As the district court made clear in granting summary judgment in favor of PCA on the *quid pro quo* claim, Jansen *did* receive her performance review and was given a satisfactory rating as well as a raise in salary. Jansen argues (and **Judge Wood** agrees) that the three-month delay in receiving her review/raise was itself an adverse job consequence, Wood Op. at pp. 199- 200, but a short delay in receiving a review/raise represents such a *de minimis* economic loss that it cannot reasonably or properly be interpreted as a "materially adverse employment action."[22] Moreover, Jansen has failed to demonstrate a causal connection between her refusal to acquiesce in Antoni's alleged advances and the delay in her performance review. As Jansen well knew, *it certainly was not an unusual occurrence for PCA to fail to conduct personnel performance reviews in a timely fashion.* In fact, delayed reviews were so common that the company had in place a policy of making pay raises retroactive to the date when the review was due to be filed. Jansen's salary raise, although tardy, was made retroactive, in full accordance with this policy.

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[22] Creatively, **Judge Wood** asserts that the plaintiff suffered a tangible economic loss because she was deprived of the *interest* she would have earned on a timely raise, Wood Op. at pp. 199-200, but I am not persuaded that the interest on a very modest amount of money, for a relatively short period of time, rises to the level of a tangible, job- related detriment.

Jansen admitted, in her deposition testimony, that she neither acquiesced in Antoni's alleged demands *nor suffered any tangible, adverse job consequences* because of her failure to do so. Although **Judges Wood and Flaum** now would both hold that a mere threat of *quid pro quo* action is actionable as *quid pro quo* harassment, they have failed to cite any case law (nor am I aware of any) that would allow Jansen to proceed under a *quid pro quo* theory on the basis of *unfulfilled* threats (or perceived threats) and nothing more. *See Gary*, 59 F.3d at 1396 ("[I]t takes more than saber rattling alone to impose *quid pro quo* liability upon an employer."). One student of employment discrimination law has recently and properly summarized the law in this area, explaining that a *quid pro quo* claim:

> requires that the victim either actually refuse the advances and suffer tangible job detriment or submit and retain a tangible job benefit. Quid pro quo theory appears not to encompass cases in which the supervisor threatens a job detriment but fails to carry through on his threat after the victim refuses to submit. *There is thus no doctrine of attempted quid pro quo harassment*; such unwelcome advances could only be challenged under the hostile work environment theory.

J. Hoult Verkerke, *Notice Liability in Employment Discrimination Law*, 81 Va. L. Rev. 273, 280 n. 15 (1995) (emphasis added).

Judge Flaum essentially maintains that there is a doctrine of "attempted *quid pro quo* harassment," and argues that his position "has a toehold in the case law." Flaum Op. at p. 18. He quotes language from three circuit court opinions for the proposition that a supervisor's unfulfilled *quid pro quo* threat may be deemed *quid pro quo* harassment: *Nichols v. Frank*, 42 F.3d 503 (9th Cir.1994); *Karibian v. Columbia Univ.*, 14 F.3d 773 (2d Cir.1994); and *Sparks v. Pilot Freight Carriers*,

Inc., 830 F.2d 1554 (11th Cir.1987). All three of these cases involved facts far more egregious than those set forth in *Jansen*. The plaintiffs in *Nichols* and *Karibian*, unlike Jansen, alleged that they *actually acquiesced* in their supervisors' demands for sexual favors in order that they might obtain or keep some kind of *job-related benefit* (in *Nichols* it was permission to take a leave of absence, in *Karibian*, the plaintiff maintained that her *"raises, hours, autonomy and flexibility" were conditioned on her willingness to sleep with her supervisor*). *Sparks* is also distinguishable from *Jansen*, for in *Sparks* the plaintiff alleged that she was *discharged* (*a clear job-related detriment*) "*in retaliation for her refusal to accede to [her supervisor's] sexual demands.*" *Id.* at 1557.

I also find problematic **Judge Flaum**'s assertion that Antoni's unfulfilled threat is actionable as *quid pro quo* harassment merely because it resulted (or allegedly resulted) in "real emotional strife" or "anxiety and distress" for the plaintiff.[23] Flaum Op. at p. 19. Nor do I agree with **Judge**

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[23] Jansen claims that she "suffer[ed] from depression and other physical and mental ailments" on account of Antoni's harassment. If Jansen prevails on her negligence claim on remand, the jury will have an opportunity to assess the credibility of her expert witnesses (if any) concerning her mental state, keeping in mind "the marked propensity of those who purport to have psychiatric expertise to tailor their testimony to the particular client whom they represent." *Steele v. State*, 97 Wis.2d 72, 97, 294 N.W.2d 2 (1980). I agree with **Judge Posner** that there is "a serious question of whether [Jansen] can obtain substantial damages" if she succeeds in attempting to establish a hostile work environment claim on remand, because she waited for some fifteen months before reporting Antoni to PCA's Human Resources Department, all the time keeping a detailed log of her alleged harasser's activities. Posner Op. at pp. 54-55. Under the doctrine of avoidable consequences, "one injured by the tort of another is not entitled to recover damages for any harm that he could have avoided by the use of reasonable effort." *Black's Law Dictionary* 136 (6th ed.1991).

Diane Wood's speculation that because a plaintiff may experience *both* types of sex discrimination at the same time, the distinctions between *quid pro quo* and hostile work environment harassment (by now well-recognized in Title VII law) are somehow meaningless. Wood Op. at p. 172. Statements of this kind only serve to further cloud the law of sexual harassment by casting a haze over the well-recognized boundaries between *quid pro quo* harassment and hostile work environment harassment. Like the experienced trial judge in *Jansen*, 895 F.Supp. at 1066, we should follow the established and well-recognized definition of *quid pro quo* harassment in disposing of Jansen's claim, instead of merely assuming that there was a *quid pro quo*, or worse, twisting the definition of *quid pro quo* harassment to fit the facts of this particular case.

I also wish to emphasize that however objectionable, Antoni's remark and gesture, *by themselves*, do not rise to the level of actionable hostile work environment harassment as defined in our case law, for they did not "cross [ ] the line that separates vulgarity (not actionable) from harassment (potentially actionable)." *Baskerville*, 50 F.3d at 431. As this court has observed, "the concept of sexual harassment . . . is not designed to purge the workplace of vulgarity." *Id.* at 430. Unfortunately, we do not live in the most cultured, virtuous or well-mannered time in world history, so that even in the workplace a certain amount of "vulgar banter, tinged with sexual innuendo," is inevitable today, particularly if one has the misfortune to work with "coarse or boorish" individuals who lack "refinement." *Id.*

In addition to arguing that a *quid pro quo* existed in *Jansen*, **Judges Flaum** and **Wood** claim that *Ellerth* also involved *quid pro quo* harassment. However, I agree with **Chief Judge Posner** that "*Ellerth*, like *Jansen*, is purely a hostile work environment case" and therefore must be analyzed

under the negligence standard. Posner Op. at p. 55. The facts of *Ellerth* do not support the strained conclusion of my respected fellow **Judges Flaum** and **Wood** that *quid pro quo* harassment took place. Ellerth's contact with Slowik (who was based in New York, more than 500 miles away) included telephone conversations with her superior approximately once a week. During two conversations in early May 1994, the following exchanges allegedly took place (as summarized by the district judge):

> [W]hen Ellerth was talking to Slowik to get special permission to do something for a customer, Slowik said something along the lines of "I don't have time for you right now, Kim, unless you're telling me—unless you want to tell me what you are wearing." Ellerth said she had to go and hung up. On a follow-up call, again to get permission, Slowik told Ellerth that she did not have permission for the project and he then said something along the lines of "are you wearing shorter skirts yet, Kim, because it would make your job a whole heck of a lot easier."

Ellerth v. Burlington Industries, Inc., 912 F.Supp. 1101, 1108 (N.D.Ill.1996).

Judge Wood, making the case for the existence of a *quid pro quo*, argues that "Slowik . . . refused to give [Ellerth] special permission for work projects until she described her physical appearance to him." Wood Op. at p. 200. Referring to Slowik's question about whether Ellerth was attired in a long or a short skirt, **Judge Wood** seemingly embellishes the facts by asserting that Slowik forced Ellerth *"to play the role of sex object* in order to obtain *desirable* work assignments." Wood Op. at p. 201 (emphasis added). Once again, the definition of *quid pro quo* harassment is being stretched to fit the facts of a particular case. While asking a female

employee to describe what she is wearing may be uncalled for and perhaps, if combined with other more egregious conduct, may give rise to a hostile work environment, such a comment is a far cry from asking a female employee to engage in sexual activity in order that she might keep her job or obtain a desired promotion. More importantly, Ellerth never did suffer an "adverse employment action" as a consequence of refusing to "play the role of sex object" (as **Judge Wood** refers to it). She was neither fired, denied a promotion, [24] suffered a reduction in pay, nor did she lose a job title crucial to her advancement, much less was she transferred to another department with diminished responsibilities or fewer opportunities for promotion. *Bryson*, 96 F.3d at 916. Furthermore, **Judge Wood** has failed to persuade me that when Slowik denied Ellerth "special permission to do something for a customer," he was making "*desirable* work assignments" (i.e., assignments that would allow Ellerth to advance at Burlington) contingent upon willingness to go along with his sexual banter. I believe that **Judge Flaum**'s and **Judge Wood**'s journey in pursuit of a *quid pro quo* (on these facts) resembles a search for a diamond in a wagonload of hay. While they claim to have discovered the diamond (i.e., a *quid pro quo*), I have combed the record and can find nothing but the hay.

Judge Kanne has brought to our attention an additional and most important point concerning the dangers of expanding the definition of *quid pro quo* harassment (to include mere threats). He notes, in his opinion, that *"quid pro quo* threats may be ambiguous, and if such threats make an employer strictly liable, plaintiffs will attempt to turn all instances of supervisor sexual harassment into 'implied

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[24] In fact, as **Judge Flaum** notes in his opinion, Ellerth received a promotion (in March 1994). Flaum Op. at p. 27 n. 13.

threats' in order to take advantage of strict liability's easier burden of proof." Kanne Op. at p. 32. A better approach would be to hold, consistent with our precedent, that plaintiffs such as Jansen and Ellerth may not proceed under a *quid pro quo* theory unless they can establish *that they have actually suffered a tangible, job-related loss (such as being fired or denied a promotion) for refusing to go along with the harasser's sexual demands*. *Bryson*, 96 F.3d at 916; *Gary*, 59 F.3d at 1396; *Hicks*, 833 F.2d at 1414.

Because our interpretations of congressional enactments such as Title VII are to serve as guideposts for the trial courts as well as for the legal profession as a whole (to say nothing of business and industry) it is crucial that we approach concepts such as *quid pro quo* harassment in a clear, logical fashion that adheres to precedent. The law of sexual harassment has become increasingly complex over the years, resulting in confusion and uncertainty as to what really constitutes sexual harassment in the eyes of the law. One observer has stated, without exaggeration, that "the web of sexual harassment [law] has truly become tangled in the mass of court opinions, agency guidelines, and law review articles on the subject." King, *Sex, Love Letters, and Vicious Rumors*, 9 B.Y.U. J. Pub.L. 341, 365 n. 5 (1995). The boundaries between "harassment" and normal interaction between the sexes are now so blurred that a six year-old first-grade student in Lexington, North Carolina who kissed one of his female classmates (also a mere six years of age) on the cheek, found himself suspended from school recently for engaging in "unwarranted and unwelcome touching" (i.e., "sexual harassment"). *See* Linda Chavez, *Feminist Kiss Patrol* is on the *March*, USA Today, Oct. 2, 1996, at 15A (common sense ultimately prevailed and the school lifted the suspension).

Mindful of the need to strike a balance between the rights of employers and employees, I am unable to join either **Judge Flaum** or **Wood** on their theory of what constitutes actionable *quid pro quo* harassment. By molding the facts of these cases, and attempting to make them fit within a newly-elusive *quid pro quo* theory, my colleagues are attempting to obliterate the very definition of *quid pro quo* harassment. In my view, their respective opinions have interpreted *quid pro quo* harassment in a fashion that can best be classified as elastic, so that the term *quid pro quo* would no longer have a fixed meaning, and would thus be stretched to accommodate the facts of the particular case. This approach, should it become the law of this circuit, will register a "7.5" on the Richter scale and will certainly upset the balance between the rights of employers and employees while adding to the existing uncertainty and confusion in this complex, controversial, ever-expanding, and troubling area of the law.

6. *Judge Posner's Approach to Employer Liability*

Judge Posner has outlined a more limited approach to the question of employer liability, yet he still advocates—largely on policy grounds—that we venture part way into the realm of strict liability. He would only impose *strict liability* in a limited subset of *quid pro quo* cases, i.e., those where the supervisor *successfully* "us[es] his delegated authority to do a company act" as part of a *quid pro quo*; for example, by firing an employee, or denying a promotion/raise. Posner Op. at p. 47. **Chief Judge Posner** does not allow himself to fall into the trap of asserting, as do **Judges Flaum** and **Wood**, that a mere unfulfilled threat to take any of these actions is a sufficient basis for holding the company strictly liable. Posner Op. at p. 49. In fact, **Judge Posner** and I are in agreement that neither Jansen's supervisor nor Ellerth's engaged in a true *quid pro quo*, yet curiously **Judge Posner** theorizes at length as to why strict liability may be

appropriate in some *quid pro quo cases*. **Judge Posner** apparently believes that if Jansen's supervisor *had* successfully blocked Jansen's promotion (because she refused to acquiesce in his sexual overtures), it would be proper to hold PCA strictly liable. I obviously agree with **Judge Posner**'s rationale that the employer, knowing he is subject to strict liability, will have more of an incentive to monitor "very carefully" the personnel decisions of all of its supervisory employees. However, my colleague has failed to persuade me that this monitoring "should be relatively easy to do," or that it will bring about an effective system for the review and control of supervisory actions taken in the exercise of "delegated authority." Posner Op. at p. 47.

Initially, I wish to re-iterate that I am in agreement with **Judge Posner** that the questions before us are matters of *federal* common law and *not* state law. However, I do not agree with the Chief Judge that we are free to ignore traditional common law principles and "create" our own set of agency principles, guided solely by our personal views of what is sound policy in this area. Posner Op. at p. 42. **Judge Posner** refers to the common law principles set forth in the American Law Institute's *Restatement (Second) of Agency* as "antiquated screed," and throughout his opinion he relies heavily on policy arguments rather than on precedent. While I appreciate and always respect the Chief Judge's candor about his preferred approach, with all due respect I submit that his method is inconsistent with our role as judges, and with the Supreme Court's directive in *Meritor* that we "look to agency principles" in this area (the Court even cited the *Restatement* as a source for such principles).

As noted at the outset, *strict liability* is based upon a *policy* judgment concerning the proper allocation of costs among various parties in society. This court at times is called upon to exercise a policy-making function, especially when a federal

statute is unclear or even silent as to a question of legal and social significance. As we fill the gaps in a federal statutory scheme such as Title VII, however, we should keep in mind the words of our distinguished colleague Judge Jesse Eschbach, that we are "*[w]riting . . . on the shores of Lake Michigan rather than the banks of the Potomac. . . .*" *Vail v. Board of Education*, 706 F.2d 1435, 1445 (7th Cir.1983) (Eschbach, J., concurring). In exercising our very limited and circumscribed policy-making role, we must proceed with caution, and not lose sight of the fact that we are bound by the Constitution and by legal precedent. Above all, we must respect the doctrine of separation of powers, which is "essential to the preservation of liberty." *Mistretta v. United States*, 488 U.S. 361, 380, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989). Under this doctrine, law*making* authority is assigned to the elected branches of Government:

> *The Constitution wisely vests [the legislative] branch of the government with the power and authority of law-making, for the legislature is better equipped to carry out that task* in that interested parties . . . are able to present their respective positions before the legislative body in a more open, unrestricted, informal forum. Thereafter, the myriad of questions and problems, as well as their possible solutions, are brought before the entire legislative branch of government and are subject to the scrutiny of public hearings and debates.

Curtis v. Thompson, 840 F.2d 1291, 1305 (7th Cir.1988).

We should also remember that there are certain *practical* limitations on our capacity to address complex social problems. As Chesterfield Smith, a distinguished former president of the American Bar Association, once observed:

> [C]ourts are being asked today to solve problems for which they are not institutionally equipped, or at least not

> as well equipped as other areas of government [such as the legislature].
>
> As far as possible, judicial forums should be reserved for doing only that which cannot be done elsewhere.
>
> The American public perceives the courts as a jack-of-all trades available to furnish the answers to whatever may trouble them. Shall a war be prosecuted or peace made? What is life, or when does death begin? Shall racial integration be achieved by . . . busing of children to far away schools? How shall prisons and mental institutions be operated? Shall nuclear power plants be built, and if so, where? Shall the Concorde fly to these shores? Is affirmative action really inverse discrimination? Shall the snail-darter survive? [Should employers be held strictly liable for acts of sexual harassment by supervisors?] . . .
>
> The courts properly should be only the conflict-resolvers and not the problem-solvers of American society.

Wangen v. Ford Motor Co., 97 Wis.2d 260, 324, 294 N.W.2d 437 (1980) (Coffey, J., dissenting) (refusing to join "judicial legislation" that would permit recovery of punitive damages in strict liability actions involving allegedly defective products). A decision issued by a panel of judges is at best a poor substitute for legislation enacted by a majority of the 100 Senators and 435 Representatives in the United States Senate and House respectively, after full hearings and debate, and signed into law by the President. The Congress, unlike this court, can act "with the benefit of citizen input . . . [and] a trained staff to search out, weigh, balance, and comprehend" the far-reaching economic consequences of policy decisions of this nature. *Id.* at 324, 294 N.W.2d 437. "It is presumptuous for this court, which does not and cannot have the benefit of public hearings and constituent expression of opinion, to commend *sua sponte* any specific change [in

legislation]," such as expanding Title VII to make employers *strictly liable*. *Id.* at 325, 294 N.W.2d 437 (quotation omitted). "If social welfare experimentation is to be conducted, it should be done by the legislature. The implications for the free enterprise system, and therefore the structure of our economy, are too disturbing to leave a decision of this magnitude to [a panel of] jurists." *Id.* at 331, 294 N.W.2d 437. As this court recognized in *Curtis v. Thompson*:

> the fact-finding and policy-making capabilities of a court of law are far more *limited and confined* [than those of the legislature] due to the very being of a court of law, enshrined with its technical rules of evidence as to admissibility and materiality that often serve to *limit a court's ability to make a clear, definitive, and thus reasoned pronouncement on matters of public policy*.

840 F.2d at 1305. In carrying out our policymaking role, therefore, it is imperative that we "exercise [our] powers of review and decision making with *discretion and reservation*, giving due deference to the other branches of government." *Id.* Until Congress or the Supreme Court addresses more definitively the issue of employer liability under Title VII, we should approach the question cautiously, and not attempt to take the law beyond both the terms of the statute and existing case law by adopting a far-reaching standard of strict liability.

Judge Posner points out, and I agree, that the costs associated with a strict liability standard will ultimately and sadly be borne *not only by the workers but also by the consumers*, Posner Op. at p. 44; *see also Excuse Factory, supra*, at 296 ("workers can be expected to shoulder the bulk of the costs of a right to sue over things that go wrong in the workplace."). Nevertheless, having pointed out these costs, **Judge Posner** fails to take them into consideration when he proposes a strict liability standard that would mandate a

highly centralized, potentially limitless, and expensive system for "supervising the supervisors." This system would require employers and CEO's to review almost any and *all* personnel and advancement related decisions with a jaundiced eye to ensure that they were not based on impermissible criteria. This kind of "monitoring" will not be "easy" in all (or even most) business settings. In fact, I am at a loss to understand how the CEO of any sizable company can be expected to monitor "very carefully" the personnel decisions of all of his company's supervisory employees, much less ascertain the subjective intentions lying behind them. I am also doubtful that supervision and training will succeed in eliminating the problem of workplace sexual harassment, whose origins are in social attitudes and beliefs that develop long before most people are old enough to draw their first paycheck.

Even if I were to agree with Judge Posner that multi-layered scrutiny of supervisory employees would prove workable in curtailing sexual harassment, this court is in no position to dictate management procedures for private businesses, nor should it impose costly legal requirements on these firms merely because we may individually be convinced that they are good policy. We judges are not "jacks of all trades," *Wangen*, 97 Wis.2d at 324, 294 N.W.2d 437, much less sufficiently trained or experienced to be classified as experts on business management. Nor, as far as I am aware, have any of us successfully completed an M.B.A. program at a recognized school of higher learning (e.g., Wharton, Kellogg, Chicago, Stanford, Harvard). We should refrain from tackling policy issues that lie beyond our province. Indeed, the Supreme Court has cautioned that "[c]ourts are generally less competent than employers to restructure business practices" and that "consequently, the judiciary should proceed with care before mandating that an employer must adopt" a particular business practice. *Wards Cove Packing*

Co. v. Atonio, 490 U.S. 642, 661, 109 S.Ct. 2115, 2127, 104 L.Ed.2d 733 (1989) (superseded in other respects by the Civil Rights Act of 1991, Pub.L. No. 102-166 § 3, 105 Stat. 1071 (1991)). When an employer delegates the making of personnel decisions to its supervisors, and when the supervisor abuses that authority by engaging in *quid pro quo* harassment, fairness dictates that the employer should be judged in terms of what it knew about the supervisor at the time it delegated authority, and whether, in light of that knowledge, the delegation of authority was *reasonable* (i.e., negligence standard). Requiring more from industry (i.e., multi-layered bureaucratic structures to "monitor" supervisory employees "very carefully") ignores the realities and complexities of the modern business world and imposes an unreasonable and unworkable burden on employers.

D. *Additional Concerns with Strict Liability*

I am forced to disagree with our Chief Judge that expanding employer liability for sexual harassment represents but a "relatively esoteric and marginal change in the law." Posner Op. at p. 50. Making the employer strictly liable for the actions of an uncouth supervisor, without regard for any safeguards the employer may have put in place to prevent or deal with the harassment, will have deep and lasting consequences. The long-term problems that will result from a strict liability standard, in my view, far outweigh the dubious alleged gains associated with such a new and far-reaching standard. First of all, a strict liability standard will affect each and every facet of personnel decision-making, including but not limited to hiring, firing, and the employee review process, possibly bringing about a fundamental re-orientation of the employer-employee relationship. It will also have the effect of "chilling" social interaction in the workplace. **Judge Posner** notes, and I agree, that "romantic encounters, including romantic encounters between

supervisors and supervised, are a fact of the workplace" and indeed, "many happy marriages have grown out of such encounters." Posner Op. at p. 50. Today, however, as a result of the "constantly shifting" rules created by "evolving court opinions," the workplace is being transformed into "a nervous nest where people are afraid to say what they think and express honest emotions." Vincent J. Schodolski, *Harassment Suits Curb Workplace Free Speech*, Chi. Trib., June 23, 1997, at 1.

The detrimental impact of a strict liability standard will, by no means, be limited to social interaction in the workplace. We should consider, as an initial matter, the ramifications of strict employer liability for the federal judicial system, of which this court is an integral part. As a respected colleague of ours on the federal bench recently observed, "the federal courts are flooded with employment cases. We are becoming personnel czars of virtually every one of this nation's public and private institutions. The drafters of [Title VII] could never have intended the resulting consequences from what they deemed to be necessary, progressive legislation." *Tschappat v. Reich*, 957 F.Supp. 297, 299 (D.D.C.) (1997) (Sporkin, J.). Not surprisingly, since Congress amended Title VII in 1991 to permit the recovery of punitive damages

(albeit only under limited circumstances),[25] the number of employment cases filed in federal court has jumped from 10,771 (1992) to 23,152 (1996). Robert J. Samuelson, *The Limits of the Law*, Newsweek, Jun. 30, 1997, at 50. We should not kid ourselves: the adoption of strict liability by judicial fiat will likewise increase the volume of Title VII litigation and strain the resources of our already over-burdened federal court system. In recent years, Congress (in addition to legislating new civil causes of action) has created a significant number of new federal crimes, without conducting judicial impact studies to determine how such legislation will affect the justice system. *See* Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 Hastings L.J. 1135 (1995). As Chief Justice Rehnquist has observed:

> [I]n talking about the future of the federal courts, we must understand that Congress probably will continue to enact new legislation that provides new causes of action for

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[25] Although the Civil Rights Act of 1991 permits the recovery of punitive damages, as well as compensatory damages for "emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses," I wish to emphasize that punitive damages are available under this law only if certain requirements are met, i.e., only if the "complaining party [can] demonstrate[ ] that the respondent engaged in a discriminatory practice or discriminatory practices *with malice or with reckless indifference to the federally protected rights of an aggrieved individual*." Pub.L. No. 102-166, § 102(b), 105 Stat. 1071, 1073 (1991) (codified at 42 U.S.C. § 1981a(b)(3)) (emphasis added). Furthermore, the combined sum of the punitive damages and the compensatory damages for non-pecuniary loss may not exceed $300,000 for each complaining party. *Id.* I point out these limitations because a plaintiff who predicates his or her claim solely on a theory of strict liability (i.e., a plaintiff who has not even demonstrated employer *negligence*), will obviously fail in establishing that an employer has acted with "malice or reckless indifference" to rights protected by Title VII.

> litigants on the civil side of the docket and new federal crimes to be prosecuted on the criminal side of the docket. *It is the federal district courts and the courts of appeals that are being hit hardest by this ever-increasing wave of litigation.* . . . With the district courts, it is largely a question of having enough judicial manpower to adjudicate the incoming cases. The same is true to a large extent of the courts of appeals. . . .

Keynote Address of Chief Justice William H. Rehnquist, Symposium: The Future of the Federal Courts (April 9, 1996), *reprinted* in 46 Am. U.L.Rev. 263, 265 (1996). In light of these developments, I am amazed that we would even consider expanding Title VII in a manner that will undoubtedly add to the already burdensome number of sexual harassment lawsuits that are brought before the trial courts and appealed to our own court.

The adoption of strict liability could also have significant, even worldwide, *economic* consequences, for it exposes American industry to a greater amount of Title VII litigation and thus adversely affects American business as it attempts to compete in an ever-expanding global marketplace. I join with thousands of American citizens who are of the opinion that employers today are over-regulated and saddled with an increasingly burdensome, indeed an overwhelming, amount of litigation, including Title VII litigation (much of which, as we realize, often is without merit). *See* Chrys A. Martin, *Special Considerations in Sexual Harassment Claims*, Federal Lawyer, Jul. 1996, at 35 ("Employment litigation is on the rise, particularly that involving claims of sexual harassment."). Indeed, the rising tide of employment-related litigation has prompted many firms to require—as a condition of employment—that employees agree to accept arbitration and forego their right to sue in court over employment-related

disputes. Leslie Kaufman & Anne Underwood, *Sign or Hit the Street*, *Newsweek*, June 30, 1997, at 48.[26]

The clarion call of the social engineers of our day seems to be that courts should *eradicate sexual harassment with instantaneous action and a broad brush and force employers to "pay the price" for alleged sexual misconduct* through the imposition of a strict liability standard, whether or not they were even aware of such conduct. That clarion call may, in fact, be more akin to *the first chime of the death knell for more and more American businesses, and workers on this side of the globe*. Unfortunately, we have been going down this road for some thirty years, as the ongoing project of contingency-fee lawyers has been to expand strict liability for deep-pocket defendants whenever possible. The expansion of products liability and punitive damages law has resulted in a windfall for contingency-fee lawyers who specialize in challenging deep-pocket corporate defendants, with the use of allegedly qualified "experts" who, in truth, courts have often found to be less than reliable, if not purveyors of so-called "junk science." All of this has created a tumultuous environment for American business, which is attempting to find its niche and compete in the global marketplace (thus generating American jobs) hampered by this albatross of court-created confusion over the scope of tort liability. *See, e.g.*, Walter K. Olson, *The Litigation Explosion* (1991).

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[26] The Supreme Court has suggested that this is a viable strategy. In 1991, the Court held that "[a]lthough all statutory claims may not be appropriate for arbitration, having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991) (stockbroker's claim under the Age Discrimination in Employment Act can be subjected to compulsory arbitration, pursuant to written arbitration agreement).

Through ill-advised decisions and judgments, our courts, egged on by activist groups, have created an almost hostile environment for business by permitting the recovery of crippling punitive damage awards and by over- expanding doctrines such as strict liability for manufacturers of allegedly defective products. *See, e.g., Wangen*, discussed *supra*. In response to the general trend of making corporate "deep pockets" strictly liable (often for large punitive awards), many businesses have moved their operations (and many American jobs) out of the country (e.g., to Mexico) or even overseas,[27] while others have been forced to close their doors or even file for bankruptcy protection.[28] It is also well-documented that the added costs of insuring and defending against these lawsuits are passed along to the consumer. As noted recently by former United States Attorney General Richard Thornburgh, the "lawsuit tax" represents approximately $100 of the cost of a $200 football helmet, $20 of the cost of a $100 stepladder, $3,000 of the cost of a heart pacemaker, more than two-thirds of the cost of a childhood DPT vaccine, and as much as $500 of the cost associated with an average two-day maternity stay in the hospital. Richard Thornburgh, *Lawsuit Loopiness: Congress, Lawyers Square Off Over Legal Reform*, Harrisburg Patriot & Evening News, Dec. 28, 1995, at A11.

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[27] *See, e.g.*, William W. George, *Medical Technology and Competitiveness in the World Market*, 50 Food & Drug L.J. 477 (1995) (describing how medical technology firms are moving their research, development, and manufacturing operations overseas in part to avoid exposure to product liability lawsuits).

[28] In May 1995, for example, the Dow Corning Corporation filed for Chapter 11 bankruptcy protection in response to a mounting number of product liability lawsuits involving the company's silicone breast implants. Milo Geyelin & Timothy D. Schellhardt, *Dow Corning Seeks Chapter 11 Shield*, Wall St. J., May 16, 1995, at A3.

Numerous state legislatures have taken action to resolve the problems that have arisen since the establishment of punitive damages liability and its developing case law. The growing number of abusive and overzealous punitive damage awards—and the courts' reluctance to deal with the same—have prompted legislative reform efforts in states across the country. 1 Ghiardi & Kircher, *Punitive Damages: Law & Practice* § 6.36 (1997). Four states, Oregon, Georgia, Connecticut, and New Jersey, have enacted product liability statutes dealing specifically with the problem of burgeoning punitive damage awards. *Id.* at § 6.38. These four states have implemented a variety of strategies to deal with the problem, including the raising of standards for establishing liability, increasing the burdens of proof, and setting fault specific criteria to be considered in determining the size of awards. *Id.* On the other hand, the states of California, Colorado, Minnesota, Nevada, North Dakota, South Dakota, and Virginia, also in an attempt to address the issue, have enacted punitive damage statutes which likewise apply to products liability. *Id.* Many of these statutes contain elements of the Uniform Products Liability Act (UPLA), model legislation drafted by the Federal Interagency Department, while others have instituted caps on punitive awards. *Id.*[29] Still other states, either by statute or by common-law, have seen fit to

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[29] *See, e.g.*, Ill. St. 735 § 5/2-1115.05 (caps punitive damages at three times economic damages); Fl. Stat. § 768.73(1)(a) & (b) (1993) (same); Ga.Code Ann. § 51-12-5.1(e) (1995) ($250,000 cap); Va.Code Ann. § 8.01-38.1 (1993) ($350,000 cap).

prohibit or sharply limit the recovery of punitive damages altogether.[30]

Concern over the adverse impact of large punitive awards has even prompted national efforts at reform. *In 1996, for example, both houses of Congress passed the "Common Sense Product Liability Reform Act," which would, inter alia, have capped the punitive damages that a jury could award in cases involving faulty products.* H.R. 956, 104th Cong. (2d Sess.). Although this reform legislation was vigorously opposed *by the National Trial Lawyer's Association and eventually vetoed by the President, it nevertheless sent a strong message that a majority of Americans are very concerned about runaway judicial decisions in the products liability area, and the impact such decisions have on business, workers, and consumers. Wall St. J.*, May 3, 1996 at B11.[31]

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[30] These states include Louisiana (prohibited by common-law but authorized by specific statutes), Massachusetts (prohibited by common-law unless expressly authorized by statute), Washington (same); Nebraska (prohibited by common-law), and New Hampshire (prohibited by statute unless specifically authorized by statute). 1 Ghiardi & Kircher, *Punitive Damages: Law & Practice* §§ 4.06-4.11 (1997). Because the common-law of Connecticut and Michigan limits punitive damages, at least in part, to those of a "compensatory" and "exemplary" nature, respectively, "some might consider that punitive damages, in the traditional sense, are not allowed in these jurisdictions." *Id.* at § 4.06 n. 1 and §§ 4.02-4.04.

[31] With respect to punitive damages, the judicial pendulum may be swinging back towards a more cautious approach, for the United States Supreme Court recently held that the due process clause of the 14th Amendment prohibits "grossly excessive" punishment in the form of punitive damages. *See, e.g., BMW of N. America, Inc. v. Gore*, __ U.S. _ , 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996) (punitive damages in excess of 500 times the amount of actual damages was "grossly excessive").

Court-created liability in the area of medical malpractice (as in the products context) has served to increase dramatically both the size and frequency of malpractice awards and settlements, *which in turn has driven up the cost of malpractice insurance premiums and contributed to the undesirable practice of "defensive medicine" (i.e., performing tests and procedures that are not medically necessary in order to safeguard against liability). See* Theodore R. LeBlang, *Medical Malpractice and Physician Accountability: Trends in the Courts and Legislative Responses*, 3 Annals Health L. 105 (1994) (discussing recent judicial decisions that have broadened liability for malpractice, as well as the costs associated with expanded liability). I agree that a physician whose carelessness or mistake h and that justice requires that the victim be compensated. However, *courts as caused injury should be held accountable under the law, today are going well beyond such basic principles of traditional tort law*. To cite but one example, it is increasingly common for the courts to permit a medical malpractice plaintiff to rely upon the doctrine of *res ipsa loquitur* in proving physician negligence, which according to one critic is nothing more than a *"means of transforming the tort regime from a fault-based system to one of strict liability."* Karyn K. Ablin, *Res Ipsa Loquitur and Expert Opinion Evidence in Medical Malpractice Cases: Strange Bedfellows*, 82 Va. L.Rev. 325 (1996) (emphasis added). *Broad, judicially-created liability for malpractice, combined with the tremendous amount of paper-shuffling that is now required of doctors in order to satisfy mounting government regulations and requirements, has driven up the cost of healthcare and prompted many physicians to leave the practice*. And once again *who has suffered: the patient-consumer*. Entangled in a legal morass created largely by ill-advised court and jury decisions, *our nation's healthcare*

industry is now controlled from the insurance boardroom rather than the caregiver's office, and it is the patient who suffers under our "revolving- door" system of medical care (e.g., by being released early from the hospital as a cost-cutting measure). As with punitive damages in the products liability context, there has been a vigorous legislative response to skyrocketing malpractice awards in the form of statutory caps on non-economic damages in many states.[32]

Just as the ill-advised expansion of the law in the aforementioned areas has worked to the detriment of the average American citizen, so too will the expansion of employer liability in the Title VII context. By ignoring the Supreme Court's decision in Meritor and embarking on an ambitious judicial project to expand employer liability, we add to the already-onerous legal and regulatory burdens on American business, and send a message to employers on this side of the water that they are now considered as second-class citizens, whose "guilt" with respect to sexual harassment may henceforth be presumed, without even so much as a showing of knowledge much less fault. If history is any guide, many American businesses will respond to these developments by boosting prices for goods and services, or by transferring and re-locating their manufacturing operations across the waters, perhaps to countries in Asia or Central America where regulatory restrictions and the level of litigation generally are

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[32] Many states, including Wisconsin, have enacted statutory caps on the amount a plaintiff can recover for "non-economic" damages (i.e., "pain and suffering") in medical malpractice cases. Wis. Stat. Ann. § 893.55(4)(d) (limiting recovery to $350,000). At this writing, the fate of Illinois' recently enacted statutory cap of $500,000 on non-economic damages in medical malpractice cases was yet to be resolved by the Illinois Supreme Court. John Flynn Rooney, "Tort-Law Uncertainties Put Brake on Pending Cases," *Chicago Daily Law Bulletin*, Vol. 143, No. 82 (April 26, 1997).

not as burdensome as in America. Or a firm might also choose to offset the increased costs associated with expanded Title VII liability by laying off workers and/or relying more upon machines and computers to do their jobs. One of my fellow judges even goes so far as to brush aside concerns about these potentially back-breaking costs, believing that costly prevention efforts will represent a corporate "investment in long-term freedom from liability." Flaum Op. at pp. 16-17. However, as **Judge Posner** cogently explains, that "investment" is essentially a form of taxation that will be borne, not just by faceless corporate entities, but by *all* in society:

> If the law requires the employer to do more than is reasonable to control harassment, it *will impose costs without any offsetting deterrent benefits. In the long run, these costs will be borne largely by consumers, in the form of higher prices for the employer's product, and workers, in the form of lower wages (because the higher costs are labor costs). Many consumers and workers are women, so women, who are the principal victims of sexual harassment, will pay a big part of the costs that employers incur as a consequence of excessively harsh principles of employer's liability.*

Posner Op. at p. 44.

I agree that eliminating sexual harassment in the workplace is a worthy and commendable goal, but we must not live under the misapprehension that *strict liability* will somehow bring about a Utopia in the workplace that will be free of sexual harassment. Given their existing liability for negligence, employers *already* have an incentive to eliminate harassment, to say nothing of the fact that they might wish to eliminate such conduct for reasons independent of their potential liability under Title VII (e.g., because harassment is disruptive of the workplace and thus undermines

productivity). **Judges Posner** and **Flaum** assume that *strict liability* will result in greater deterrence, but they fail to explain *how* this will happen. They effectively distill their argument into a cost-benefit analysis—that is, but for strict liability in *quid pro quo* cases, employers would presumptively prefer to incur the occasional cost of Title VII litigation rather than institute expensive measures to foster a "harassment-free" working environment. I am forced to disagree with this speculative theorizing, which is barren of support in empirical data.

In my view, the imposition of strict liability in the employment discrimination context represents a new and unwarranted extension of the doctrine of strict liability. The kind of cost-benefit reasoning that perhaps justifies strict liability for manufacturers of defective or faulty products is not convincing when applied to the employment arena. The manufacturer of a defective product may and oftentimes does *profit* from the sale of that product and arguably when it does, should be held strictly liable once it is established that a pre-determined fault or defect has caused harm. But obviously there is no gain to an employer when one of his supervisory employees engages in the sexual harassment of another employee.

In the products liability area, the imposition of strict liability is meant to impact on the *economic* decisions that manufacturers make about cold, tangible products made of metal, steel, iron, plastic and rubber, for "a manufacturer can anticipate certain hazards and 'guard against their recurrence' in a way that consumers cannot; similarly, consumers cannot investigate the 'soundness' of products." Marshall S. Shapo, 1 *The Law of Products Liability* § 7.05[4] (3d ed.1994). Manufactured products can be measured, analyzed, and tested by the manufacturer, and when a defect is identified, it can be remedied by replacing a dangerous machine or part with an

improved or new design that is safer, in an attempt to avert liability. The human "defects" in employees, by contrast, are largely hidden, elusive, and lie beyond the effective control of the employer. Only with great difficulty (if at all) can an employer measure and detect the human element that is "defective," i.e., the thoughts, feelings, and behavior of its employees or potential employees. Obviously, these "defects" are less susceptible to correction or "fixing" by the employer than is the case with defective products. Although **Judge Posner** argues that strict liability will result in "very careful" "monitoring" of supervisory employees, and thus a reduction in the amount of harassment in the workplace, I question whether such monitoring is feasible. *Human behavior is influenced by myriad factors that lie hidden below the surface—beyond the reach of even today's surveillance cameras and x-ray machines.* These factors include one's *upbringing*, moral *beliefs*, *heredity*, and *environment*. Additionally, as medical science is now discovering, *the ebb and flow of chemicals within the human body* (e.g., *hormones and neurotransmitters*) *can and do profoundly affect behavior, sometimes resulting in depression, anxiety, and even anti-social acts such as sexual harassment. Substance abuse, which often goes undetected in the workplace, can upset the normal chemical balance within the human body, ofttimes contributes to behavior that is inappropriate, immoral, or even criminal in nature.* Without prying deeply into the personal lives of its employees or potential employees, how is an employer supposed to have knowledge of, much less remedy, all of the factors that could possibly contribute to an employee's decision to engage in sexual harassment?

It is interesting to note that even under the existing negligence regime, an employer's attempts to avert liability by identifying and "weeding out" potential harassers in the

workforce are often frustrated by state employment laws, which can interfere with the employer's ability to assess whether an individual is predisposed to engage in harassment (or other unlawful conduct). Following a case in which one supermarket employee was raped by another, a women's rights activist in Boston, Massachusetts (affiliated with a national organization) reportedly called for employers "to investigate the backgrounds of employees more thoroughly," opining that "[i]f an employer is not going to look out for the safety of employees, who is?" Walter Olson, "How Employers Are Forced to Hire Murderers and Other Felons," *Wall St. J.*, June 18, 1997 at A23. Ironically, however, the kind of background investigation that might serve to protect other employees (and members of the public) is often prohibited by law and can lead to the employer being sued for employment discrimination. Wisconsin law, for example, generally forbids an employer from asking job applicants or employees whether they have an arrest record. Wis. Stat. Ann. §§ 111.331, 111.32, and 111.335.[33] Nor may a Wisconsin business base an employment decision upon an individual's prior criminal *conviction*, unless the circumstances of the offense "substantially relate to the circumstances of the particular job." Wis. Stat. Ann. §

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[33] In Wisconsin:

> Employment discrimination because of arrest record includes, but is not limited to, requesting an applicant, employe, member, licensee or any other individual, on an application form or otherwise, to supply information regarding any arrest record of the individual except a record of a pending charge. . . .

Wis. Stat. Ann. § 111.335.

111.335.[34] Whether an employee or prospective employee has a past arrest or conviction for, let us say, sexual assault, would be *highly* relevant to the individual's inclination to engage in sexual harassment or even rape, but in most instances such information is off limits to Wisconsin employers. Illinois, similarly, does not permit employers to use arrest information in making employment decisions. 775 ILCS 5/2-103.[35] If strict liability is adopted as the standard in Title VII sexual harassment cases, the restrictions that bind employers in any states with laws similar to those of Wisconsin and Illinois will only be made more pronounced. Walter Olson, the author of a recent book aptly titled *The Excuse Factory: How Employment Law is Paralyzing the American Economy* (Free Press 1997), has described this bind or dilemma as yet another example of the "sued-if-you-do, sued-if-you-don't regime we impose on . . . business." Olson, "How Employers Are Forced to Hire Murderers," Wall St. J., June 18, 1997 at A23. In the context of employer liability for sexual harassment, I ask: "Why should courts search for ways to tighten the noose around employers' necks (i.e., strict liability), and thus further 'paralyze' the American economy?"

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[34] In 1996, the Wisconsin Senate passed a bill (S.572) to repeal these controversial provisions of Wisconsin law (which are opposed by business groups) but the legislation failed to pass the Wisconsin Assembly. According to press reports, similar legislation may be re-introduced this year. *See* Geeta Sharma-Jackson, "Bill Could Restrict Felons' Jobs: Lawmaker Wants to Let Employers, Not State, Make Hiring Decisions," *Milwaukee Journal-Sentinel*, May 10, 1997 at 1.

[35] Illinois' prohibition does not extend to prior convictions, which may be used "in evaluating the qualifications and character of an employee or a prospective employee." 775 ILCS 5/2-103.

We should recognize that "[m]en do not discard their personal qualities when they go to work," *Hartford Accident & Indem. Co. v. Cardillo*, 112 F.2d 11, 15 (D.C.Cir.1940), and that the vexing social problem of sexual harassment will very likely persist in the workplace, to some degree, regardless of the fact that an individual enterprise may devote considerable resources to its eradication. An individual's disposition to sexually harass, despite years of educational programs promoting gender sensitivity and public awareness and condemnation of harassment, is engendered in him long before he enters the workforce (indeed, our armed forces are currently struggling with this very problem, and finding it most difficult to root out deeply-seated social attitudes, despite their best efforts). Is it fair and equitable that we require business and industry (and their stockholders) to *automatically* bear the costs of remedying one of the more troublesome social problems of the present day; a problem that business and industry did not create, and that society as a whole has been unable to solve, notwithstanding tremendous effort for lo these many years? If any governmental body should adopt new law that would dramatically affect human interaction in the workplace, it should be Congress, which could act with the benefit of expert testimony, whether it be from human resource directors, social workers, psychologists, psychiatrists, or others with knowledge and experience in the behavioral sciences. New departures in the law of sexual harassment—if any—must be left to the thorough deliberation, study, hearings and decision of the legislative body, and not resolved by judicial fiat.

An employer *should* be held liable for true sexual harassment in the workplace if the employer had prior *knowledge* of the alleged harassment and *failed to take appropriate and timely measures*. However, in our litigious society I fail to understand how this court can justify

expanding sexual harassment liability *beyond* the traditional, tested, true, logical, and common-sense parameters of the negligence standard, in favor of strict liability. Courts setting Title VII standards must proceed with caution and above all attempt to strike a balance between the rights, duties and obligations of employers and employees. Under a regime of strict liability, the unreported acts (or alleged acts) of even the lowliest supervisor would give rise to *automatic* liability for the employer. While the negligence standard is flexible and attempts to gauge the reasonableness of an employer's actions in a given set of factual circumstances, strict liability is a blunt legal instrument (a sledgehammer, if you will) that sexual harassment plaintiffs will wield to bludgeon employers and hold them liable for the improper conduct of their supervisory employees *regardless of the circumstances*. Delivering such a *gift-wrapped weapon* to Title VII plaintiffs would undoubtedly *tip the very delicate balance of the scales of justice in favor of Title VII plaintiffs and against employers. Strict liability, in the present context as set forth herein, amounts to overkill and fails to strike the balance we are obligated to continually strive to achieve if American industry and our never-ending search for justice are to co-exist and endure*.

Strict liability in sexual harassment cases could also spill over into other Title VII contexts. For example, as the law in this Circuit currently stands, hostile work environment claims for harassment on the basis of race are analyzed pursuant to a negligence standard. *See Daniels v. Essex Group, Inc.*, 937 F.2d 1264 (7th Cir.1991) ("*Plaintiff must be able to prove that the employer knew or should have known of the harassment and failed to take prompt remedial action.*"). Insofar as **Judge Wood** explains that "[s]exual harassment is no different . . . than other forms of discrimination," Wood Op. at p. 185, it is only a matter of time before we are

implored to cast aside *Daniels'* negligence standard in favor of strict liability for racial harassment, so that businesses will be made to pay a price when racism rears its ugly and uncontrolled head in the workplace, unbeknownst to the employer, *or perhaps in spite of the employer's best efforts to eliminate racism from the workplace*.

I am of the opinion that in fairness to the American worker, consumer, and employer, we should *reject the strict liability theories proposed by* ***Judges Posner, Flaum, Easterbrook and Wood*** *and hold employers liable in cases of true sexual harassment only when and if they knew or should have known of the harassment and failed to take proper remedial measures*. In the employment context, liability should be based on fault, and *the flexible negligence standard should be used to determine an employer's legal responsibility in Title VII sexual harassment cases*, regardless of *who* allegedly engaged in the harassment (supervisor vs. co-worker) or what *type* of harassment allegedly occurred (*quid pro quo* vs. hostile work environment). I fear that the approach advocated by some of my esteemed fellow judges will open the door to further interpretive problems and leave the law of sexual harassment even *more* inconsistent, complicated, and difficult to follow than it is today (indeed, speaking as a former trial judge, I question how trial judges will ever be able to make sense of and apply our disparate holdings in this *en banc* decision).

E. *Negligence Standard Applied*

Jansen has introduced sufficient evidence of PCA's possible negligence in failing to protect Jansen from sexual harassment to warrant a trial on this issue, and summary judgment in favor of PCA should be reversed so that there can be a limited jury determination on the negligence question. As **Judge Posner** points out, the company did counsel Antoni *about sexual harassment* on at least two

occasions prior to the alleged incidents involving Jansen. A jury will have to consider and weigh all of the facts and circumstances pertaining to PCA's alleged negligence, but a rational finder of fact might very well conclude, on the basis of the evidence in the record, that the company was on notice concerning Antoni's behavior and that its remedial measures (counseling) failed to prevent the problem from recurring in Jansen's case.

I reach the opposite conclusion with respect to Ellerth's case. As an initial matter, I concur with **Judge Posner** that Ellerth has waived her negligence claim, for Ellerth conceded, in her reply brief to the petition for rehearing, that § 219(2)(b) (negligence) "does not apply to this case." Posner Op. at p. 57. But even assuming that Ellerth's negligence claim has *not* been waived, summary judgment in favor of Burlington was proper and should be affirmed for the simple reason that the employer had no *knowledge* of the alleged harassment and was therefore not negligent. **Judge Wood** writes (and **Judge Flaum** agrees) that Ellerth's communications to "a number of Burlington employees" were somehow "sufficient to put the company on notice of the problem [with Slowik]." Wood Op. at p. 202. I disagree. Burlington's sexual harassment policy, which Ellerth received and read as part of the company's employee handbook, stated that the company would "not tolerate any form of sexual harassment in the workplace" and specifically directed employees to report their concerns about harassment *to either (a) their supervisor or (b) the human resources department*. Additionally, the employee handbook set forth the company's "open door" policy, which stated that if employees had concerns they did not feel comfortable discussing with their supervisors, they should raise those

concerns with the human resources department.[36] Although Ellerth claims to have mentioned her problems with Slowik to some co-workers, and to a manager in *another* division of the company, she admits that none of these individuals were her superiors at Burlington. In short, Ellerth failed to follow the procedures outlined in Burlington's sexual harassment policy by reporting Slowik's conduct to anyone at Burlington who was authorized to deal with such concerns, or to anyone designated to deal with such complaints by the sexual harassment policy. She failed to contact either (a) her immediate supervisor (Lawrence) or (b) the Human Resources Department. I agree wholeheartedly with **Judge Posner** that "with rights should come responsibilities," including, in Ellerth's case, the responsibility "to complain about Slowik *through proper channels*," i.e., by using the procedures spelled out in the company's published policy against sexual harassment. Posner Op. at p. 57.

Allegedly, Slowik told a number of off-color jokes (surprisingly, Ellerth cannot recall the content thereof) and allegedly made comments about Ellerth's legs, all in the presence of a Vice President of Burlington at a business luncheon. However, even assuming that these allegations are true, they are insufficient to establish that the company was on notice of sexual harassment, for, as **Judge Posner** notes, "the vice-president had no reason to think Ellerth offended by Slowik's banter; not all women would be." Posner Op. at p.

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[36] **Judge Diane Wood** inexplicably criticizes Burlington's policy as "brief" and "skimpy," without explaining how the policy falls short of her ideal. Wood Op. at pp. 196, 202. At any rate, under the strict standard **Judge Wood** espouses, the presence or absence of a sexual harassment policy would appear to have *no* bearing on a firm's liability, for the firm would be held responsible regardless of the measures it took (or did not take) to prevent harassment.

56. Indeed, one has to question whether Ellerth found the jokes offensive, for she cannot recall the content of even one of them.

II. JANSEN & "APPARENT AUTHORITY"

The discussion of Jansen's "apparent authority" claim in the Court's *per curiam* opinion and in the separate opinions of my fellow judges[37] fails to provide adequate guidance to judges (including the trial judge on remand), lawyers, and affected parties. Although both **Judge Wood** and **Judge Flaum** discuss "apparent authority" in the abstract, it is unclear whether or not they conclude that Jansen has come forward with evidence sufficient to survive summary judgment on this theory. On the other hand, from my reading of the record I am convinced that Jansen has failed to meet her burden of demonstrating that PCA, through its acts and omissions, created an appearance that Antoni was authorized to engage in acts of sexual harassment.

Apparent authority is "such authority as a principal intentionally or by want of ordinary care causes or allows [a] third person to believe that [his] agent possesses." *Black's Law Dictionary* 96 (6th ed.1991) (citations omitted); *see also Restatement (2d) Agency* § 219(2)(d). As **Judge Flaum** correctly notes, "apparent authority exists only 'to the extent that it is *reasonable* for the third person dealing with the agent to believe that the agent is authorized' and the third person actually believes the agent to be authorized." Flaum Op. at p. 20 (quoting *Restatement (2d) Agency* § 8 cmt. c). When analyzing an apparent authority claim, the proper focus must be on the perceptions of the third party (in this case the

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[37] Judge Manion and I are in substantial agreement concerning the concept of "apparent authority" and its application to sexual harassment cases. *See* Manion Op. Part III.

plaintiff Jansen) and whether those perceptions were reasonable. One scholar has observed that "[i]n the sexual harassment context, the principal's actions must have given the victim a *reasonable* belief that the perpetrator of the harassment had authority to harass. For this reason, apparent authority seems an *unlikely* basis for employer sexual harassment liability." Phillips, *Employer Sexual Harassment Liability*, 44 Vand. L. Rev. at 1247-48.

Judge Wood co-mingles her discussion of "apparent authority," a concept set forth in *Restatement* § 219(2)(d), with her analysis of vicarious liability under § 219(1). Moreover, **Judge Wood**'s interpretation of "apparent authority," like her analysis of *respondeat superior* liability, is far too broad. According to **Judge Wood**, who once again reaches out to expand concepts set forth in the *Restatement*, we should not ask whether the supervisor had apparent authority to harass but instead whether he had the apparent authority to "hire, assign, supervise, etc." Wood Op. at p. 190. If the supervisor appeared to have such authority and engaged in harassment, then according to **Judge Wood**, "liability [for the employer] should result." Wood Op. at p. 190. It seems to me that the question **Judge Wood** would have a jury answer is far too broad, for the mere fact that an employee occupies a supervisory role to some degree does not suffice to establish liability under an "apparent authority" theory. Rather, as the trial judge in *Jansen* explained:

> liability is based upon the fact that the agent's position facilitates the consummation of the [tort], *in that from the point of view of the third person the transaction seems regular on its face and the agent appears to be acting in the ordinary course of the business confided to him.*

Jansen, 895 F.Supp. at 1066 (quoting *Restatement (2d) Agency* § 261 cmt. a) (emphasis added).

I have been unable to discover any evidence in the *Jansen* record from which a rational jury could conclude that Antoni, however improper his conduct may have been, "appear[ed] to be acting in the ordinary course of . . . business" when he allegedly engaged in the acts of sexual harassment. Jansen claims that she was aware of various unsubstantiated rumors to the effect that (1) Vicki Wiley left PCA because Antoni had "give[n][her] a hard time," and (2) PCA tolerated workplace affairs and possibly even sexual liaisons (including one or two that supposedly involved Antoni) on the premises. Mere office gossip and banter falls far short of establishing that PCA either condoned or licensed sexual *harassment*, nor would unsubstantiated rumors permit a *reasonable* person to conclude that such harassment was part of the "ordinary course of business" at PCA. Although the plaintiff self-servingly claims that she was unaware of PCA's sexual harassment policy, the deposition testimony of Henry Weil (Director of Operations) and Antoni makes clear that the policy was posted conspicuously in at least one if not *two* locations, *prior* to Jansen's complaint, including a bulletin board on the first floor near the entrance to the plant, which Jansen admitted passing "every single day." PCA's policy—which was explicit, detailed, in writing, and posted where employees could see it—made clear that harassment would not be tolerated at PCA and encouraged employees to report any and all instances of such harassment to "appropriate management." A rational jury, on the basis of this record, could not find that PCA failed to post its anti-harassment policy conspicuously enough, nor could it conclude that the plaintiff had a *reasonable* belief that PCA authorized, condoned, or sanctioned sexual harassment. Therefore, although I see merit in allowing Jansen's negligence claim to go forward, I do not believe that her "apparent authority"

claim should proceed to trial because the facts of her case are plainly insufficient to support such a claim.

As the experienced trial judge recognized, the *weak evidence* adduced by the plaintiff to support her "apparent authority" argument is more than overwhelmed by evidence that Jansen *knew* Antoni "was operating outside the scope of his apparent authority in harassing her." *Jansen*, 895 F.Supp. at 1067. "If a person has information which would lead a reasonable man to believe that the agent is violating the orders of the principal or that the principal would not wish the agent to act under the circumstances known to the agent, he cannot subject the principal to liability." *Restatement (2d) Agency* § 166 cmt. a (quoted in *Jansen*, 895 F.Supp. at 1066). Thus, Jansen's knowledge or awareness that Antoni was operating outside the scope of his employment *completely* defeats her "apparent authority" argument. In addition to the posted anti-harassment policy,[38] there is further evidence of Jansen's awareness that sexual harassment was not authorized at PCA, for when Jansen did make up her mind to complain about Antoni (in mid-January 1993, at which time the alleged harassment had been going on for at least 15 months), she had no difficulty whatsoever in knowing how to proceed. Without hesitation, she contacted the proper individual at PCA (Human Resources Director Paul Migala), who took prompt action to address the situation. As the district court noted, the existence of a mechanism for dealing

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[38] At this juncture, I note another area of disagreement with **Judge Wood**'s opinion. **Judge Wood** asserts that the existence of a policy against sexual harassment does not affect an employer's liability under an apparent authority theory. Wood Op. at p. 190. However, the existence of a publicized sexual harassment policy should logically and legally create awareness that sexual harassment is frowned upon by the company and will not be tolerated. Under these circumstances, a reasonable belief in the supervisor's "authority to harass" would be impossible.

with sexual harassment not only serves to negate any finding of negligence on the part of the employer, it also quite obviously "*removes the guise of apparent authority from the harassing supervisor.*" *Jansen*, 895 F.Supp. at 1067. In other words, because "Jansen plainly knew that she had some recourse at [PCA] . . . she cannot now claim that she believed Antoni's conduct to be sanctioned by [PCA]." *Id.* The evidence in the record, considered as a whole, falls short of establishing that Jansen had reason to believe that PCA authorized, condoned, or sanctioned acts of sexual harassment. Thus, with respect to Jansen's apparent authority claim, we should affirm the trial judge's grant of summary judgment in favor of PCA.

"Apparent authority" is a legitimate "agency principle," *see Restatement* § 219(2)(d), but if it is interpreted too broadly, or applied without regard to the facts, it becomes the functional equivalent of strict liability. I agree with **Judge Manion** that "it is hard to imagine a scenario where an employee *reasonably* believes her supervisor's job description includes the right to harass her." Manion Op. at p. 163 (emphasis added). This is particularly true in cases such as *Jansen*, where the employer had promulgated and publicized a clear policy forbidding sexual harassment in the workplace. *See* Phillips, *Employer Sexual Harassment Liability*, 44 Vand. L. Rev. at 1242-43 ("Claims that a supervisor had . . . apparent authority to harass almost certainly will fail if, as is increasingly common today, the employer maintains an anti-discrimination or anti-harassment policy."); *see also* Manion Op. at p. 161 n. 4 (and cases cited therein).

III. PROCEDURAL ISSUES: WAIVER

In evaluating **Judge Wood**'s and **Judge Flaum**'s analyses of what constitutes *quid pro quo* harassment, I have previously observed that neither of the cases before us involved a true *quid pro quo* as defined in our case law. Even

if Jansen and Ellerth *did* suffer from *quid pro quo* harassment, however, under our case law they have waived their *quid pro quo* claims because they failed to raise them in their respective EEOC complaints or district court pleadings. In short, I disagree with my fellow judges, who either assume (or in **Judge Wood**'s case, explicitly argue) that Jansen and Ellerth have preserved their claims of *quid pro quo* harassment for appellate review. Wood Op. at pp. 198-199.

Jansen did not raise a *quid pro quo* allegation until almost the overtime period in the lawsuit, more than a year after filing her complaint, when she submitted a memorandum and supporting affidavit in opposition to PCA's motion for summary judgment. She had not previously alleged that Antoni suggested any kind of explicit or implicit sexual *quid pro quo* in *her report to PCA, her filing with the Equal Employment Opportunity Commission ("EEOC"), or her complaint filed with the district court.* Nor was this allegation ever listed in Jansen's detailed and exhaustive handwritten "log" (allegedly chronicling Antoni's harassment of her during the fifteen-month period prior to her complaint). In her deposition, Jansen not only failed to make such allegations, she went so far as to concede that her performance review was "[n]either discriminatory nor retaliatory" (Jansen received a satisfactory evaluation and a raise in salary, retroactive to the time when the review was due). Jansen further testified, in her deposition, that she reported *all* alleged acts of sexual harassment to PCA and to the EEOC.

Jansen's belated assertions of *quid pro quo* harassment run afoul of well-established and important procedural rules, which for reasons unexplained the court has chosen to ignore. *Title VII plaintiffs who wish to bring a claim in federal court must initially set forth their claim in a filing with the EEOC, or they are barred from pursuing the claim. Cheek v.*

Western and Southern Life Ins. Co., 31 F.3d 497, 500 (7th Cir.1994). This rule serves to "giv[e] the employer some warning of the conduct about which the employee is aggrieved," *Id.* (citations omitted), and permits the EEOC to conduct an independent investigation in order that it may assist the parties in determining whether court proceedings are necessary. 42 U.S.C. § 2000e- 5(b). Jansen's EEOC filing made no allegation of *quid pro quo* harassment, nor did it set forth any facts that would support such a claim.

A civil plaintiff is barred from injecting new allegations into his or her case by raising them *after* the defendant has filed a motion for summary judgment, for *such a strategy fails to give adequate or fair warning as to the claims the defendant must address and defend against. Andree v. Ashland Co.*, 818 F.2d 1306, 1314 n. 11 (7th Cir.1987) (district court properly excluded a claim made for the first time in opposition to summary judgment). **Chief Judge Posner**, in an opinion joined by **Judge Rovner**, very recently noted that *this court has been "critical of efforts to patch up a party's deposition with [her] own subsequent affidavit." Russell v. Acme-Evans Co.*, 51 F.3d 64, 67 (7th Cir.1995). Similarly, in an opinion authored by **Judge Kanne** and joined by **Judge Flaum**, this court has unequivocally stated that "*parties cannot thwart the purpose of Rule 56 [summary judgment] by creating issues of fact through affidavits that contradict their own depositions.*" *Darnell v. Target Stores*, 16 F.3d 174, 177 (7th Cir.1994) (quoting *Miller v. A.H. Robbins Co., Inc.*, 766 F.2d 1102, 1104 (7th Cir.1985)). By raising allegations of *quid pro quo* harassment in her affidavit (after failing to raise them in her EEOC complaint and after conceding in her deposition that her performance review was not discriminatory) Jansen clearly attempted to use her affidavit for the improper purpose of "retract[ing] or explain[ing] away concessions that [she made] in [her]

deposition." *Russell*, Jansen, 51 F.3d at 67. Which of Jansen's three statements are we to believe: her EEOC filing (submitted in early 1993, shortly after the harassment allegedly occurred), her sworn deposition testimony, or her sworn affidavit?

According to Seventh Circuit case law, because Jansen failed to raise her *quid pro quo* harassment claims in a timely fashion, she has *waived* those claims on appeal. I am at a loss to understand how this court can ignore its own precedents and rely upon allegations that were, in all likelihood, created and conjured up by the plaintiff "at the last minute" in order to bolster her case. *See Russell*, 51 F.3d at 67 (observing that "[a]lmost all affidavits submitted in litigation are drafted by the lawyers rather than by the affiants."); *Darnell*, 16 F.3d at 177; *Andree*, 818 F.2d at 1314.

Many of my observations concerning procedure in *Jansen* apply with equal force to Ellerth, *who also neglected to raise a claim of quid pro quo harassment in either her EEOC filing or her district court complaint*. Until today, we have followed the principle, as set forth by **Judge Rovner** in *Saxton v. American Telephone & Telegraph*, 10 F.3d 526, 533 (7th Cir.1993), that when a Title VII plaintiff "first attempt[s] to articulate a basis for a *quid pro quo* claim in her appellate briefs . . . that, of course, is too late." *Id.* (declining to reach the merits of plaintiff's *quid pro quo* claim because she relied "solely" upon a hostile work environment theory at the district court level).

What lessons are future litigants to derive from the court's abandonment of well-established procedural rules in the two cases before us today? Is the message that rules about waiver no longer exist? We would be well-advised not to cast aside the procedural rules in either Jansen's or Ellerth's case for a cause and also for the purpose of making the road wider and easier for future Title VII plaintiffs, nor should we use the

cases before us as a vehicle for announcing a new strict liability standard that is specific to *quid pro quo* cases. This kind of approach will only serve to undermine respect for our precedents and encourage other plaintiffs (and their lawyers) to flout important procedural rules, to the detriment of the judicial process.

IV. CONCLUSION

I concur with the majority that the district court's dismissal of Jansen's claims of retaliation and intentional infliction of emotional distress was proper, and I also agree that *Jansen* should be remanded in order that a jury may address the limited question of whether PCA was negligent in preventing Antoni's alleged hostile work environment harassment. However, as discussed, I am of the opinion that Jansen has waived her *quid pro quo* claim and I do not believe that Jansen has come forward with evidence sufficient to survive summary judgment on her apparent authority claim.

Most importantly, I am not persuaded that this court should do an "end run" around the Supreme Court's decision in *Meritor* by adopting strict liability in *quid pro quo* cases, as proposed by **Judges Posner**, **Flaum**, **Easterbrook** and **Wood**. Factually, neither of the cases before us involved true *quid pro quo* harassment, and indeed, the plaintiffs have waived any such claims. Therefore, even if I were to agree that strict liability is the proper standard in *quid pro quo* cases (the common thread which unites **Judges Posner**, **Flaum** and **Wood**), the two companion cases before us are hardly the proper vehicle for announcing such a rule.

In the more than thirty years since Congress outlawed sex discrimination in the workplace (*via* a "last minute" amendment to Title VII) our nation's legislature has been silent concerning the meaning and scope of sex discrimination, and it has not, to date, enacted a statutory

definition of sexual harassment. This congressional silence, possibly attributable to pressure from special interest groups, has left a vacuum to be filled by the courts, and as the opinions of judges across the land unfortunately demonstrate, a number of courts have been all too willing to interpret sexual harassment law expansively. The current state of affairs—legislative silence coupled with energetic judicial "gap-filling"—has done violence to the Framers' intent that lawmaking authority be vested in the legislative branch, and not the judiciary. It is my hope that Congress will address this issue and relieve the overburdened court system of the present and anticipated influx of oft-times unfounded sexual harassment litigation. Unlike a court of law the Congress may investigate, hold hearings, and receive input from a wide range of experts, as well as those who are likely to be affected by changes in sexual harassment law. Congress, in the exercise of its wisdom and judgment, might provide for alternatives to strict liability that certainly would not be quite as far-reaching as strict liability. For example, Congress could provide more extensive remedies (e.g., double or treble damages) in cases where it could be established that (a) the plaintiff suffered true *quid pro quo* harassment, and (b) the employer knew of the harassment but failed to take appropriate remedial measures. Such an approach would retain the well-accepted and tested negligence standard, but increase the price tag for employer negligence with respect to *quid pro quo* harassment. This is but one example of how the nation's constitutionally designated lawmaking body might choose to deal with the problem of *quid pro quo* harassment, while still allowing employers to defend themselves by demonstrating that they lacked knowledge of the harassment and/or took reasonable measures to prevent the same.

In closing, I observe that "sexual harassment" is in the eyes of the beholder. One person's idea of friendly banter is

another's idea of harassment. In the highly-politicized environment surrounding the volatile issue of sexual harassment in the workplace, neither employers nor employees have a clear understanding of what conduct the law allows, much less what it prohibits. Congress, as noted, has been silent. And despite a profusion of reported cases on sexual harassment, the judicial branch has failed to reach consensus about the meaning and extent of Title VII's prohibition against sexual harassment (indeed, the eight separate opinions submitted by members of this court today are powerful proof that the law in this area is unclear and unsettled). As it stands today, the law of sexual harassment "tend[s] to avoid giving employers definite rules to obey but instead lay[s] out sweeping if vague aspirations that are given the force of law. . . . No one really knows where these concepts begin and leave off; all employers know is that if they guess wrong some future jury or judge may decide that they have broken the law." Olson, *Excuse Factory* at 3. In light of this uncertainty and confusion, I believe it is particularly unfair and most unreasonable to hold an employer *automatically* (strictly) liable for the alleged missteps of an alleged "supervisor," irrespective of the employer's lack of *knowledge* concerning the "harassment" and regardless of his efforts to discourage harassment in the workplace. *Strict liability tips the time-honored and respected scales of justice in favor of the plaintiff.*

EASTERBROOK, *Circuit Judge*, concurring in part and dissenting in part. Chief Judge Posner's approach to this subject has many virtues, simplicity and the creation of desirable incentives prominent among them. I would join his opinion if I thought that federal judges were free to devise a law of vicarious liability for Title VII cases. Yet we are not. Title VII creates a national anti-discrimination rule but does not deal with all discrimination in the labor force. Only employers and their agents are covered. 42 U.S.C. § 2000e(b). Who speaks or acts for the employer? Who is an agent? Title VII does not say. It does not even hint. The answer must come from elsewhere. When a federal statute is silent, we obtain the necessary rule from state law, unless application of state law would undermine a federal norm. *Atherton v. FDIC*, 117 S.Ct. 666, 670, 136 L.Ed.2d 656 (1997) (collecting cases); *Turner/Ozanne v. Hyman/Power*, 111 F.3d 1312 (7th Cir.1997).

Meritor Savings Bank, fsb v. Vinson, 477 U.S. 57, 72, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986), directs the inferior courts "to look to agency principles for guidance in this area." "Agency principles" come from state law, as the Court implied by citing the *Restatement of Agency*, a distillation of decisions by state courts. "Agency principles" answer the question: who can make commitments, and whose acts can create liability, for a corporation? Like other questions about a corporation's organization and distribution of powers, and about the liability of its investors (who really pay judgments against corporations), agency depends on state law, for it is state law under which corporations exist. Corporations are complex webs of contracts, themselves specialties of state law. Thus *Meritor* tells us to "look to," not "make up," agency principles. One can "look to" principles only in an existing body of law, which means state law, for there is no

free-floating common law. *Erie R.R. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938).

Relations such as agency that are undefined by federal statute, like other elements of the background against which federal rules operate, come from state law—either directly, when the Rules of Decision Act, 28 U.S.C. § 1652, requires, or indirectly when federal law absorbs a needed rule from state law. (The difference between direct and indirect use of state law does not matter to these cases.) Although use of state law to determine the extent of vicarious liability entails disparity across state borders, even within a single firm, this is no more an objection than it would be for other torts or contracts. Suppose Slowik entered into a contract with Ellerth raising her salary, or made a defamatory statement about her (as she says he did, when he implied in conversation that she had capitulated to his demands). State law would determine whether the raise stuck (or whether someone higher up had the final word), and whether the slander was within the scope of employment—which is to say, state law determines who is the firm's agent, and for what purposes. Who speaks or acts on behalf of a corporation is a fundamental question of corporate organization, all but invariably resolved under state law, as *Atherton* shows even for firms chartered by the United States.

Absence of a national rule means that firms must answer for supervisors' acts in some states but not others. Many of my colleagues object to the possibility of variation, but if different treatment of the same facts in different states authorized the creation of federal common law, *Swift v. Tyson*, 41 U.S. 1, 16 Pet. 1, 10 L.Ed. 865 (1842), would hold sway today, *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 99 S.Ct. 1448, 59 L.Ed.2d 711 (1979), would have come out the other way, and a host of cases from the last 20 years using state law to decide subsidiary, but dispositive, questions

in litigation under federal statutes would be overthrown. E.g., *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 114 S.Ct. 2048, 129 L.Ed.2d 67 (1994); *Kamen v. Kemper Financial Services, Inc.*, 500 U.S. 90, 111 S.Ct. 1711, 114 L.Ed.2d 152 (1991); *Wilson v. Garcia*, 471 U.S. 261, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985); *Marrese v. American Academy of Orthopdic Surgeons*, 470 U.S. 373, 105 S.Ct. 1327, 84 L.Ed.2d 274 (1985); *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 101 S.Ct. 2061, 68 L.Ed.2d 500 (1981); *Robertson v. Wegmann*, 436 U.S. 584, 98 S.Ct. 1991, 56 L.Ed.2d 554 (1978); *Miree v. DeKalb County*, 433 U.S. 25, 97 S.Ct. 2490, 53 L.Ed.2d 557 (1977). Reverse the uniformity question and ask: Why should an act of sexual harassment by a supervisor be attributed to the firm under state law but not under Title VII (or under Title VII but not state law)? Federal common law achieves horizontal but not vertical uniformity.

Title VII is no different, in needing the assistance of state-law principles, from the antitrust, aviation, banking, securities, and other civil rights laws, the subjects of the seven cases just cited. *O'Melveny* and *Kamen* in particular use principles of state law to address questions about responsibility of a firm for acts of employees or agents, although in both cases liability would be based on national

law.[1] Employment is a contractual relation, see *Hishon v. King & Spalding*, 467 U.S. 69, 74, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984), which implies that the line between an employee (covered by Title VII) and a partner or independent contractor (not covered) comes from state contract law. Cf. *Ost v. West Suburban Travelers Limousine, Inc.*, 88 F.3d 435 (7th Cir.1996) (using common law principles to distinguish employees from independent contractors, but without discussing choice of law). The question whether a person can bind the employer by contract—for example, by settling litigation under Title VII—similarly depends on state law. *Morgan v. South Bend Community School Corp.*, 797 F.2d 471 (7th Cir.1986). Cf. *Kokkonen v. Guardian Life Insurance Co.*, 511 U.S. 375, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994). In *Peacock v. Thomas*, 116 S.Ct. 862, 133 L.Ed.2d 817 (1996), the Supreme Court held that state law determines when an investor is vicariously liable for a federal-law judgment against the corporation. These principles likewise point to state law to determine when the corporation is vicariously liable for an employee's acts.

None of the parties argues that federal statutory law specifies the extent of an employee's ability to bind the employer. Federal law requires complainants to file their

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[1] The holding in *O'Melveny* is that state law governs whether an employee's or agent's knowledge is imputed to a bank that has been taken over by the FDIC, or to the FDIC as its receiver, while federal law determines whether a financial institution that acts with particular knowledge is liable. The holding of *Kamen* is that state law determines whether investors in a mutual fund regulated by the Investment Company Act must make demand on the board of directors before commencing a derivative action (that is, an action as the corporation's agents) seeking recovery under federal law. In each case, an adverse decision on the agency issue under state law would have scotched the substantive claim based on federal law.

grievances initially with state agencies, 42 U.S.C. § 2000e-5(c), the better to coordinate application of national and local anti-discrimination rules. Why undercut coordination by adopting for purposes of Title VII a set of agency rules that differs from those the state would apply to the same claim of discrimination? Preserving vertical uniformity is a strong reason *not* to have federal rules. Although the parties have briefed these cases on the assumption that federal law governs, we are entitled to disregard that forfeiture and to decide independently which body of law supplies the essential principles. *Kamen*, 500 U.S. at 99. See also *United States National Bank of Oregon v. Independent Insurance Agents of America, Inc.*, 508 U.S. 439, 445-48, 113 S.Ct. 2173, 124 L.Ed.2d 402 (1993).

State courts devising principles of vicarious responsibility are not stuck in the 1940s or condemned to use irrelevant analogies. Corporate law, actively monitored and adjusted by state courts, is one source of rules for determining when a manager's acts are attributed to the firm. Many states are developing distinctive bodies of law about workplace harassment, sometimes holding employers liable for acts perpetrated by supervisors. Some of these cases have been decided under state or local anti-discrimination laws. State courts may interpret their usual agency principles when adjudicating claims of discrimination, just as we have been invited to do, or they may devise a specialized body of agency doctrine for discrimination cases, as several of my colleagues prefer. *Green Hills Country Club v. Illinois Human Rights Commission*, 162 Ill.App.3d 216, 113 Ill.Dec. 216, 514 N.E.2d 1227 (5th Dist.1987), shows that Illinois holds a firm answerable for the kinds of supervisory conduct involved in our cases. A statute dealing with vicarious liability in discrimination cases supports its conclusion. 775 ILCS 5/2-102(D). State statutes and judicial decisions alike supply the

law that we should use. (Recall what *Erie* held: that statutory and common law are treated the same under the Rules of Decision Act.) Illinois would hold both employers vicariously responsible for the conduct of Ellerth's and Jansen's supervisors.[2] Federal law then makes that conduct actionable.

Illinois does not draw a line, for purposes of vicarious liability, between quid pro quo demands and hostile work environments. We should not superimpose such a distinction on a body of agency law that does not require it. Not unless Title VII itself requires that distinction, and it does not. Title VII forbids sex discrimination in employment. Insistence on performance of sexual services as a condition of receiving the pay or position to which a person is otherwise entitled is sex discrimination; so is the maintenance of an environment in which women are made to feel unwelcome or miserable, when men performing the same tasks are treated well. See *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993). Recognition that there are multiple ways to discriminate, in violation of federal law, does not imply different rules of vicarious liability.

Distinctively federal rules of vicarious liability in discrimination cases would be justified if application of the state's law of agency undermined a federal interest. State law then is preempted, and the court must fashion a substitute. In *Community for Creative Nonviolence v. Reid*, 490 U.S. 730,

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[2] Chief Judge Posner cites an impressive number of opinions in which Illinois courts declined to impose *respondeat superior* liability for wrongs employees committed against third parties, such as customers, shoplifters, guests, students, and patients. *Green Hills* is that state's only appellate case dealing with sexual harassment of co-workers, and given 775 ILCS 5/2-102(D), we lack a good reason to suppose that the Supreme Court of Illinois would disapprove the approach *Green Hills* took.

109 S.Ct. 2166, 104 L.Ed.2d 811 (1989), the Court devised a special agency rule for copyright cases, believing state rules to be inconsistent with one of the aims of the federal law. No one contends that Illinois' law of agency and Title VII are similarly incompatible. Cf. *Johnson v. Fankell*, 117 S.Ct. 1800, 1804-07, 138 L.Ed.2d 108 (1997) (collecting cases about the incompatibility caveat to the use of state law). Chief Judge Posner's assertion that my approach "implies that by a stroke of a pen Illinois could eliminate all Title VII liability in that state that depended on the principles of agency law" (slip op. at 37) slights the doctrine that state law is used only if compatible with the federal norm. If a risk that state law may try to undercut the interest protected by federal law means that state law does not apply, then state law would *never* be used to resolve subordinate issues in federal litigation. A state's ability to set a one-day statute of limitations for personal-injury claims would allow it to wipe out liability for constitutional torts under § 1983, which in turn (on my colleague's view) would foreclose resort to state law no matter what its actual period of limitations was. What the Supreme Court has told us to do is different: we use state law unless its actual period of limitations is so short or so freighted with conditions that its application imperils vindication of the federal right. *Burnett v. Grattan*, 468 U.S. 42, 104 S.Ct. 2924, 82 L.Ed.2d 36 (1984). See *Morgan*, 797 F.2d at 475; *Amanda Acquisition Corp. v. Universal Foods Corp.*, 877 F.2d 496 (7th Cir.1989). A state may set a period of limitations as long as it likes, or apply lax tolling rules; a longer time to sue does not undermine the interest protected by the federal law. See *Gosnell v. Troy*, 59 F.3d 654, 656 (7th Cir.1995). Similarly a state may expand employers' liability, by imputing many supervisors' acts to the firm, without offending Title VII. My colleagues do not identify a single state agency rule, anywhere in the nation, that is

incompatible with Title VII. Irony lies in adopting a novel federal rule—one less favorable to victims of workplace torts than actual state rules—in order to avoid a phantom "hostile" state rule.

Employers' (and employees') main source of protection from silly rules is generality: a state cannot affect claims under federal law without affecting claims under state law too. Nothing I have written here implies that federal courts should pay heed to a law such as: "For purposes of litigation under Title VII, supervisors' acts are attributed to the firm if . . . ." Illinois' agency rules largely favor claims by employees. How far a state may move toward negating principles of *respondeat superior* is not a question we need engage today. Answering that question is impossible in the abstract, and hard in the concrete; some difficulties, at least, therefore are avoided if we disregard state law. But inventing federal common law is a dubious project for reasons both legal and practical. The legal reasons I have covered. The practical objections include the difficulty of formulating a good rule. Why should we think that our latest brainstorm will really be an improvement? Most mutations in biology and law alike are inferior. Common law of agency has stood the test of time in a way my colleagues' proposals have not. Any federal rule also creates vertical disuniformity: the same supervisory act is imputed to the firm for purposes of state but not federal law, or the reverse. Perhaps more surprisingly, a federal rule will do little to create horizontal uniformity. Thirteen federal courts of appeals comprising some 200 judges are bound to see these issues differently—the one proposition conclusively established by today's welter of opinions—and the Supreme Court lacks the time (and may lack the inclination) to superintend a national body of agency law. Admiralty, the most distinctive body of federal common law, has taxed the Court's resources and patience. Discrimination cases are

more plentiful by two orders of magnitude, yet in the 33 years since Title VII was enacted the Supreme Court has heard only two involving workplace harassment. Prospects for a uniform federal common law in this field are dim.

Title VII does not preempt state anti-discrimination laws, and it is unwise to use one set of agency rules for state purposes and a completely different set for the same acts by the same supervisors under Title VII. Several of my colleagues' opinions endorse strict liability for supervisors' quid-pro-quo demands, even though *Meritor* rejected that approach for similar claims.[3] Now it may be that agency principles often imply automatic corporate liability for supervisors' misconduct, as Judge Wood concludes (and as *Green Hills Country Club* shows), but following normal agency principles when they produce that outcome does not offend *Meritor*; this is what *Meritor* requires us to do. Judge Wood's opinion reaches sound conclusions about both the law and the facts; I join it in every respect but one.

The exception is that I would treat both *Jansen* and *Ellerth* as claims of hostile working environments. Although, on the approach Judge Wood and I take, there is no material legal difference between quid-pro-quo and hostile environment claims, this distinction matters to a majority of the court, so it is helpful to get the nomenclature straight. Slowik implied that he would hinder Ellerth's advancement if she did not provide sexual favors, but when she refused he did not carry

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[3] Taylor, the supervisor in *Meritor*, allegedly demanded that Vinson perform sexual acts to show "gratitude" for his assistance in securing her employment and advancement; she says that she complied. See *Vinson v. Taylor*, 753 F.2d 141, 143-44 (D.C.Cir.1985). A woman forced to pay a bribe (in sexual services) is a victim of sex discrimination, because a male employee would have received the same salary or advancement without bribing the supervisor.

through. He did not reduce her status or salary; indeed, he secured a promotion for her. Ellerth quit only because the working environment was spoiled by the sexual innuendo and offensive touchings. Antoni, like Slowik, also relented when his victim balked. The delay in Jansen's raise did not cost her anything; the employer provided back pay, and Jansen does not contend that she was entitled to interest on this sum. (For all we know, the employer paid interest.) Both plaintiffs therefore received their injuries exclusively from a supervisor's boorish conduct, rather than via the pay envelope or by submitting to unlawful demands. Both Slowik and Antoni solicited other persons to pay tribute (in the form of sexual acts) in order to receive benefits to which they were entitled. That is not only attempted extortion of the subordinate but also attempted theft from the employer, because Slowik and Antoni tried to use the company payroll to finance the acquisition of personal sexual services. Extortion and theft, whether completed or attempted, are crimes, and the incidence of this conduct might decrease if prosecutors treated them that way. What matters for current purposes, however, is that the attempts failed, leaving only the unpleasant working environments.

MANION, *Circuit Judge*, joined by POSNER, *Chief Judge*, concurring and dissenting. Although I recognize that the possibility of any reader (other than members of this court) finding this opinion buried amid 200 pages is remote, I will nevertheless forge ahead. I write separately not to propose yet another standard of employer liability in cases of a supervisor's sexual harassment, but rather to condense some of the areas of agreement and dispute set out by the various writings submitted by other members of the court. At this point, four of the circuit judges have proposed distinct standards of liability in cases where a supervisor sexually harasses a subordinate. The central question is whether strict liability should be applied, and if so, for what? And if it is applied, should it be against an employer for all forms of sexual harassment in the workplace, or only for quid pro quo harassment? And then we need to define quid pro quo harassment—is it for some job action taken against an employee, or is the mere threat of a job action enough? Further, what level of supervisor can inflict the company with strict liability—a high-level supervisor who has the independent and unreviewable authority to execute, or a lower-level supervisor, even one who might be better described as a co-worker, whose input in job actions is limited to routine recommendations and job reports to a higher decision-maker?

If we were writing the law on a clean slate, I would be inclined to join Judge Coffey in imposing a singular, consistent standard for all types of harassment: negligence. That approach recognizes the unfairness in imputing vicarious liability to an employer for a supervisor's errant, personal and illegal acts that have nothing to do with the employer's business or the supervisor's responsibilities. But the slate is not clean. Unfortunately, as revealed by the volume of writings presented under the two cases decided

today, the slate is marked with many confusing and even conflicting standards that give trial courts little guidance in this sensitive area. Nevertheless, I strongly endorse much if not most of what Judge Coffey has presented in his very detailed and thorough analysis. Although I am not able to join the bottom line of his concurrence, I strongly endorse his approach on many of the underlying issues.[1]

Given the state of the case law, it is my conclusion that Chief Judge Posner has fashioned an approach that is in line with *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986), our own precedent in this area, and common sense. It is a practical and facile approach that draws needed bright lines (or at least brighter ones) in a dim area of employment law involving dimwitted behavior by offending employees. Judge Posner's "company act" approach helps sort out an issue that has confounded courts since *Meritor* was decided more than a decade ago. Its power lies in its underpinnings: there is no existent "law of agency" able to answer the questions before us today, and the Supreme Court itself recognized that common law principles are not transferable "in all their particulars to Title VII." 477 U.S. at 72.

Judge Flaum has drawn some lines that appear to have attracted at least a plurality of the other judges on the court. It is a rather back-to-basics approach that is commendable for several reasons. Primarily, it retains the distinction between

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[1] *See ante* (Coffey concurrence) at 80-82 (discussing definition of "supervisor" within the context of Title VII and the National Labor Relations Act); 93-94 (discussing what constitutes a "materially adverse employment action"); 98 (introducing and at the same time rejecting the concept of "*attempted* quid pro quo harassment"); at 132 n.38 (arguing that an anti-harassment policy makes a reasonable belief in apparent authority "impossible").

hostile environment harassment and quid pro quo harassment, and it imposes a consistent standard of liability (negligence) in cases of hostile environment harassment no matter whether the harasser is a supervisor or co-worker. In that regard, however, I am less enthusiastic about the somewhat nebulous "heightened" standard of care in cases where the harasser is a supervisor rather than a co-worker. But in most respects Judge Flaum's approach is consistent with Chief Judge Posner's, the principal difference being—and it is a major one—how to treat a supervisor's threats of a job action if the employee does not comply with his sexual demand. I agree with Chief Judge Posner and Judge Kanne that threats without tangible job consequences ("company acts" such as a demotion or firing) should not impose on an unsuspecting employer the harsh penalty of strict liability.

Judge Wood's approach differs substantially from the other three by favoring one standard of liability in all cases of supervisory sexual harassment. Under that standard, an employer is liable if the supervisor committed harassment during the course of his supervision. If so, then the harassment is within the scope of employment even if his motivation was entirely personal and unrelated to the employer's business. If outside the scope of employment, then liability under this approach results if (1) the employer is negligent in failing to address the harassment; or (2) the supervisor has apparent authority to take the employment actions at issue. In addition, Judge Wood apparently has accepted Judge Easterbrook's standard of applying state laws of agency, so that an employer's liability under Title VII depends upon which state law a court applies. Without saying so, Judge Wood's approach effectively imposes strict liability for all sexual harassment, and with Judge Easterbrook's wrap of a 50-state standard, I find it unacceptable.

While these four distinct approaches do not cover every option, there are common threads running through the approaches of Judges Posner, Coffey, and Flaum that are consistent and important. Each favors a negligence standard of employer liability if the alleged harasser is a co-worker of the victim, which includes low-level supervisors who in practical terms are acting as co-workers and not supervisors when they harass. This is consistent with all of our recent decisions addressing this issue. *See McKenzie v. Illinois Dep't of Transportation*, 92 F.3d 473, 480 (7th Cir.1996); *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428, 432 (7th Cir.1995); *Carr v. Allison Gas Turbine Div., General Motors Corp.*, 32 F.3d 1007, 1009 (7th Cir.1994). The alleged harasser in *Baskerville* was a low-level supervisor, and nothing in today's decision should be interpreted to mean that a negligence standard is inappropriate in cases where the harasser happens to outrank the victim in the company's hierarchy.

In addition, a majority of the court has decided to retain a standard of strict liability in cases of actual quid pro quo harassment, or for what Chief Judge Posner terms "company acts." This is consistent not only with *Horn v. Duke*, 755 F.2d 599 (7th Cir.1985), but the decisions of other circuits as

well.[2] Both Judge Flaum's approach and Chief Judge Posner's retain the distinction between hostile environment harassment and quid pro quo harassment. Given the state of the law, this distinction makes sense; a "company act" such as a supervisor's termination of an employee who refuses to have sex with him is much more severe than the general creation of a hostile environment (which typically consists of multiple acts of harassment actionable only in combination by creating an offensive work environment). The company

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[2] At least eight other circuits have confronted the issue of liability for quid pro quo harassment. Each has either expressly embraced a standard of strict liability or has commented that other courts uniformly impose such liability. *See Torres v. Pisano*, 116 F.3d 625, 1997 WL 290196, at *6 (2d Cir. June 3, 1997) ("liability for quid pro quo harassment is always imputed to the employer"); *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437, 1443 (10th Cir.1997) ("In cases involving quid pro quo harassment, courts routinely hold, with little or no discussion, that the employer is 'strictly liable' for the supervisor's wrongful conduct."); *Canutillo Independent School Dist. v. Leija*, 101 F.3d 393, 397 (5th Cir.1996) ("Courts have held an employer strictly liable for '*quid pro quo*' harassment"); *Martin v. Cavalier Hotel Corp.*, 48 F.3d 1343, 1351 n. 3 (4th Cir.1995) ("[defendant] recognizes that in *quid pro quo* sexual harassment cases an employer is automatically liable for its supervisor's conduct"); *Nichols v. Frank*, 42 F.3d 503, 513 (9th Cir.1994) (Judge Reinhardt, with two judges concurring in result) ("Once quid pro quo sexual harassment has been established, the harasser's employer is, ipso facto, liable"); *Kauffman v. Allied Signal, Inc.*, 970 F.2d 178, 185-86 (6th Cir.1992) ("Under a 'quid pro quo' theory of sexual harassment, an employer is held strictly liable for the conduct of supervisory employees having authority over hiring, advancement, dismissal, and discipline, under a theory of respondeat superior."); *Chamberlin v. 101 Realty, Inc.*, 915 F.2d 777, 785 (1st Cir.1990) ("[A]n employer is strictly liable for the actions of its supervisors that amount to sexual discrimination or sexual harassment resulting in [a] tangible job detriment to the subordinate employee."); *Steele v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311, 1316 (11th Cir.1989) ("In a quid pro quo case, the corporate defendant is strictly liable for the supervisor's harassment.").

act also is much more detectable than harassment committed outside the employer's vantage point, or at least it will become more readily detected once employers understand that they are strictly liable for these acts. When a supervisor wishes to fire a subordinate, it will behoove the employer to know the reasons and ensure that they are valid and non-discriminatory. Although this probably will require more detailed procedures, it is a better result than monitoring the workplace as if it were a prison, searching for inappropriate behavior and earning the disgruntlement and dissatisfaction of employees in return.

These are the areas of general agreement. But as the length and the separate writings in this "opinion" demonstrate, many differences remain. Four major areas remaining in dispute merit some discussion.

I. Quid pro quo harassment and a supervisor's unfulfilled threats

As I noted above, the court has retained the distinction between quid pro quo harassment and hostile environment harassment. In addition, under both Judge Flaum's approach and Chief Judge Posner's approach, an employer is strictly liable for a supervisor's quid pro quo harassment. And because of that harsh standard of strict liability, it is important and necessary to keep the definitions clear and narrow. Quid pro quo harassment occurs when the submission to a superior's sexual demands is made a condition of tangible employment benefits. Before strict liability attaches, however, the plaintiff must meet a significant burden.

Quid pro quo harassment is a special case of sexual harassment. This means that the plaintiff must establish the basic gate-keeping requirements of a sexual harassment claim in order to state a quid pro quo claim (e.g., unwelcome sexual

advances motivated at least in part by the plaintiff's sex). However, in addition to these elements, the plaintiff must establish (1) an ultimatum or *strong* suggestion on the part of a supervisor that failure to comply with a sexual demand will cause an employment detriment; and (2) that when she refused to comply with the demand, the supervisor imposed upon her a tangible job detriment.

These two additional elements are necessary because they distinguish quid pro quo claims from hostile environment claims. The first element—an ultimatum on the part of the supervisor—may be either explicit or implicit. An example of an explicit demand is a supervisor who tells an employee she will be fired if she refuses to have sex with him. (This assumes, of course, that he has the power to unilaterally fire her.) But most cases fall into the "implicit" category, such as the supervisor who discusses the employee's job performance (and performance review) at the same time he broaches the subject of sexual favors. The closer the nexus between the discussion of the review and the sexual advance, the more likely the case involves actionable quid pro quo harassment. (This again assumes the supervisor's review has a dispositive effect on the subordinate's job.) But there is a dangerous trend to stretch the boundaries of this element so that any harassment by a supervisor who has authority to influence raises, leaves of absences, or other job benefits is quid pro quo harassment. Proof that the harassment is by a supervisor (who often has plenary power over the employee-plaintiff) is a necessary, but not a sufficient condition to establishing a quid pro quo claim. The plaintiff also must offer evidence that the supervisor, through his words or conduct, *actually conditioned* the employee's receipt of the benefits on his receiving sexual favors. Typically this occurs only when the supervisor is discussing job benefits with an employee *at the same time* he is discussing the sexual favors with her.

The second element of a quid pro quo case (that the plaintiff suffered a tangible job detriment as a result of not submitting to the advances) is equally important if we are going to impose strict liability in these cases. Sexual harassment is a tort, and strict liability is not imposed on tortious conduct except in rare circumstances, such as inherently dangerous activities requiring great care on the actor's part. (See Coffey concurrence, *ante* at 89.) Where those activities result in danger but not in damage, no liability exists. So too with quid pro quo sexual harassment. If the plaintiff has suffered no tangible job detriment as a result of not submitting to a sexual demand (*e.g.*, she has called the supervisor's bluff), then the tort is incomplete and no cause of action can lie. While it is true that the adverse employment action (or tangible job detriment) may vary in form from case to case—a demotion in one case, a loss of title in another, *Bryson v. Chicago State Univ.*, 96 F.3d 912, 916 (7th Cir.1996)—the job detriment must be material and tangible.

A threat without negative job consequences cannot support a quid pro quo claim. An employee who either has succumbed to her supervisor's sexual advance or has called her supervisor's bluff has suffered no tangible job detriment. In either case, absent a complaint by the employee, the company is in the dark. Even more so with belated claims of resulting psychological or emotional distress. Strict liability for injuries known only to her and her doctor is clearly unjust. Suppose the threat is "have sex with me or you're fired." Unless the employee complains, or refuses to have sex with the supervisor and thus is discharged, the company knows nothing. We can encourage companies to review discharges to make sure that they are legitimate (it would be unfortunate to require closer scrutiny when men fire women, but with this trend in the law it may come to that). But if in this example

the employee was not fired, there is no "company act" to review. We all agree that the purpose behind vicarious liability of any kind is deterrence. A standard of strict liability on the employer's part will not deter the making of threats any more effectively than a standard of negligence because the employer is helpless to prevent them in the first place. No one favoring strict liability for mere threats has suggested that a company surreptitiously monitor its supervisors' conversations with employees to prevent threatening statements from being made.

Threats cannot constitute quid pro quo harassment for the same reason they could not fall within the supervisor's scope of employment—they are not authorized, they do not carry the employer's imprimatur, they do not speak on behalf of the company. In Chief Judge Posner's parlance, they are "noncompany acts"; in Judge Coffey's, they constitute "attempted quid pro quo harassment." In either case, they are personal and the employer has no reason to know they were uttered. If we treated threats as company acts, thus implicating strict liability, then we would be saying that any supervisor, acting on his own, has the power to bind an employer to liability based on tort, while at the same time few among us would agree that he could so readily bind his employer to a contract. And because so many complaints of sexual harassment contain threatening comments, quid pro quo harassment and strict liability would become the typical case rather than the narrow exception it should be.

II. The Restatement (Second) of Agency

The Supreme Court did not elaborate when it instructed courts "to look to agency principles for guidance" in the area of employer liability for sexual harassment. *Meritor*, 477 U.S. at 72. We are left to determine exactly what "common-law agency principles" it intended. *Id.* While the *Restatement (Second) of Agency* might look like a logical starting place, its

usefulness is limited in cases such as this one. Issued almost forty years ago, nowhere does it mention sexual harassment; indeed, it predates Title VII. In fact, there is not much in the *Restatement* that makes any sense to apply to the sexual harassment context. The most applicable section probably is § 474, dealing with the so-called "fellow servant rule." But as Chief Judge Posner points out, applying that section to sexual harassment cases would be hopelessly confusing and formulaic. We would have to determine whether the harassing supervisor is a "vice principal" or a "superior servant." *See, e.g., Restatement* § 479. If the supervisor was classified as a superior servant, then another rule applies: "the master is not liable unless the superior servant's act is so close to that which he is authorized to do that it is within the scope of his employment." *Restatement* § 487, Comment *a*. This chain reaction is never-ending if we treat the *Restatement* as a surrogate statute.

Courts run into similar problems when trying to wring out a useable standard of employer liability from § 228 of the *Restatement*. That section contains a four-part test to determine whether conduct of a servant is within his scope of employment. I need not quote all of that section, for my colleagues do. It should be enough to quote § 228(2), which plainly states that "[c]onduct of a servant is not within the scope of employment if it is different from that authorized, far beyond the authorized time or space limits, *or too little actuated by a purpose to serve the master*." (Emphasis added.) Section 235 explicitly states that an "act of a servant is not within the scope of employment if it's done with no intention to perform it as a part of or incident to a service on account of which he is employed." Comment c could well be referring to an intentional tort such as sexual harassment in noting that "[t]he fact that an act is done in an outrageous or abnormal manner has value in indicating that the servant is not

actuated by an intent to perform the employer's business."[3] That Comment also recognizes that in many cases the servant (supervisor) is "merely using the opportunity afforded by the circumstances to do the harm." This is precisely what a supervisor who sexually harasses is doing—taking advantage of his circumstances, such as his proximity to the employee and authority over her. It makes him an opportunist and his employer a victim of circumstances beyond its control.

Against this backdrop some of my colleagues conclude that a supervisor's sexual harassment may well fall within the scope of his employment. That would seem to be the rare case indeed, as other circuits have held. *See Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437, 1444 (10th Cir.1997) ("sexual harassment simply is not within the job description of any supervisor or any other worker in any reputable business"); *Andrade v. Mayfair Mgmt., Inc.*, 88 F.3d 258, 261 (4th Cir.1996) ("illegal sexual harassment is an illegitimate corporate activity, beyond the scope of supervisors' employment"); *Gary v. Long*, 59 F.3d 1391, 1398 (D.C.Cir.1995) (harassing supervisor acts outside the scope of his employment in creating hostile environment, and employer is not liable where it has adopted policies and implemented measures condemning sexual harassment); *Bouton v. BMW of North Am., Inc.*, 29 F.3d 103, 107 (3rd Cir.1994) (sexual harassment is outside scope of employment and liability for supervisor's sexual harassment may only be imputed to employer where supervisor exercises actual or

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[3] We concluded as much in *Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417, 1421-22 (7th Cir.1986), when we determined that an employer was liable ("only for those intentional wrongs of his employees that are committed in furtherance of the employment; the tortfeasing employee must think (however misguidedly) *that he is doing the employer's business in committing the wrong.*") (Emphasis added).

apparent authority; but plaintiff's belief that supervisor has apparent authority is unreasonable if the employer has a sexual harassment policy known to plaintiff).

My colleagues who embrace the *Restatement* and elevate it to the level of statutory force must accept the consequences as well. Under § 228, harassment only falls within the scope of a supervisor's employment if for some (inexplicable) reason, the supervisor believes that he is furthering the employer's business in the process. But more than this, the harassment also must approximate the type of conduct that the employer authorized, and obviously no reasonable employer would authorize such mistreatment of its own employees. Judge Wood believes that focusing on the conduct authorized by the employer is a "misstep," and that we should ask only whether the harassment occurred during the course of the employee's supervision. In other words, the issue would not be whether the tortious conduct creating the issue of liability was authorized, but whether it was performed by the supervisor *in the course* of his authorized activities. But if our reading of the *Restatement* is a misstep, then we are not alone, and the Supreme Court has stumbled too. *See Varity Corp. v. Howe*, 116 S.Ct. 1065, 1073, 134 L.Ed.2d 130 (1996) (citing Restatement's § 229(1) as "determining whether an activity is within the 'scope of . . . employment' in part by examining whether it is '*of the same general nature as that authorized*' ") (emphasis added).[4]

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[4] Judge Wood believes this interpretation is wrong because it effectively means sexual harassment could never be within the scope of a supervisor's employment—after all, no reasonable employer ever would authorize a supervisor to harass. Of course, this is why scope of employment and apparent authority theories are inapplicable in this context. As Chief Judge Posner explains, the solution is not to contort these theories until they appear to fit into this discussion, but to recognize that they have little to offer when it comes to a serious analysis of employer liability for sexual harassment.

III. "Apparent" authority

My third area of major disagreement concerns liability under a theory of so- called "apparent" authority. Apparent authority "is the power to affect the legal relations of another person by transactions with third persons, professedly as an agent for the other, arising from and in accordance with the other's manifestations to such third persons." *Restatement (Second) of Agency* § 8 (1957). Where a company publishes a policy against sexual harassment, as most employers do, there is no basis to support liability under a theory of "apparent" authority. This is in accord with the Court of Appeals for the Third Circuit, which has held that "[a] policy known to potential victims . . . eradicates apparent authority the harasser might otherwise possess." *Bouton v. BMW of North Am. Inc.*, 29 F.3d 107, 110 (3rd Cir.1994). Simply put, apparent authority must be based on an employee's reasonable belief that the agent (the supervisor) had authority, and no employee reasonably could believe that her supervisor was entitled to harass given a policy against such harassment.[5]

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[5] This position appears to be gaining support from other circuits. *See Torres v. Pisano*, 116 F.3d 625, 1997 WL 290196, at *7 n. 14 (2d Cir. June 3, 1997) ("Liability cannot attach on [the] grounds [of apparent authority] in the instant case, however, as it is undisputed that [the plaintiff] knew of [the defendant's] harassment policy and its availability."); *Harrison*, 112 F.3d at 1444 ("[The existence of apparent authority] will often hinge upon whether the employer has a formal policy against sexual harassment. When an employer lacks a formal written grievance policy, a victim of sexual harassment will reasonably perceive her only available options to be silently acquiescing in the harassment or leaving her job. In contrast, if an employer has taken steps to remove any possible inference that a supervisor has authority to sexually harass his subordinates, the victim is likely aware the harassment is not authorized and *any reliance on apparent authority will be difficult to establish.*") (Internal quotation marks omitted) (Emphasis added). But it is not an altogether new understanding

Apparent authority is the square peg that doesn't fit into this round-hole discussion. The theory mostly applies to contracts between a stranger and an agent of the defendant (the principal). Where the principal has led the stranger to believe that the agent has the authority to make the contract, the principal is bound by it. So the stranger's reasonable belief must be based on some affirmative act done by the principal. *See Bourjaily v. United States*, 483 U.S. 171, 189, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987) ("the agent's authority must be traced back to some act or statement by the alleged principal"); *see also Restatement* § 8 Comment *a* ("Apparent authority results from a manifestation by a person that another is his agent, the manifestation being made to a third person and not . . . to the agent."). Neither Jansen nor Ellerth contends that their employers informed them that their supervisors had the authority to sexually harass them. The facts demonstrate the opposite. For example, Ellerth concedes that Burlington had a policy *against* harassment and that she knew of it.[6]

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of apparent authority. *See Barnes v. Costle*, 561 F.2d 983, 996 (D.C.Cir.1977) ("[I]t could not be reasonably believed by an employee that the supervisor's [sexual] demands derived from the employer or that in complying with such demands the employee actually relied upon the authority of the employer.") (MacKinnon, concurring).

[6] I agree with Chief Judge Posner that an employee has a responsibility to complain about harassment, thus giving the employer an opportunity to remedy the situation before she files suit. Where she does not complain, and the employer has no reason to know of the harassment on its own, it would seem to be the rare case that the employer should be held liable under the law. And courts should not assume that employees who do not complain wanted to do so but were afraid: "[T]he law will not presume in every case that harassed members of Title VII's protected classes do not know what is best for themselves and cannot make reasonable decisions to delay—at least for a time—pursuing harassment claims, perhaps for privacy or emotional reasons, until they are ready to do so." *Torres v. Pisano*, 116

Some of my colleagues apparently believe that an employer may be liable so long as it approves of the supervisor's general supervision, rather than his specific act of harassment. For them it is enough that the employer's general grant of authority to the supervisor "enabled" him, or put him in a position, to commit an intentional tort. *See post* at 200 ("The one action [Antoni] took that was clearly unrelated to his supervisory position was his alleged vandalism of [Jansen's] car. No authority that PCA gave him *enabled him*, *helped him*, or affected his ability to take knife to tire.") (Judge Wood, concurring) (Emphasis added). Under that approach, an employer nearly always is liable because the powers it bestows upon a supervisor "enable" and "help" him to harass a subordinate. Apparently, the only requirement is that he be on the job when he commits the tort. It is the wrong approach because it altogether shifts focus away from the agent's activities, and imposes liability on the employer no matter how dissimilar the conduct is to the activities the employer actually authorized and communicated

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F.3d 625, 1997 WL 290196, at * 11 (2d Cir. June 3, 1997). As Chief Judge Posner notes, *ante* at 49-50, from a distance it is difficult to distinguish an office romance from a coerced or unwelcome alliance. An employer should not have to make that distinction. *See Barnes*, 561 F.2d at 999 ("The sexual advance of a supervisor toward an employee is seldom a public matter; and the distinction between invited, uninvited-but-welcome, offensive-but-tolerated and flatly rejected advances ordinarily does not fall within the special ability of the employer or higher supervisor to discern.") (MacKinnon, concurring). While an employer may discourage intra-office dating, especially between supervisors and subordinates, it should not have to inquire into a relationship to make sure it is "voluntary." The potential victim of a sexual demand should first say "no" and if the supervisor won't take no for an answer, then she must report the demand to someone higher up. Of course if the victim can show that the employer nevertheless should have known, liability would still attach, but because of negligence, not strict liability.

to the employees as authorized. In a nutshell, an intentional tort such as sexual harassment is so outrageous (by now everyone knows it's illegal) that it is hard to imagine a scenario where an employee reasonably believes her supervisor's job description includes the right to sexually harass her. *See American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 566, 102 S.Ct. 1935, 72 L.Ed.2d 330 (1982) ("Under an apparent authority theory, '[l]iability is based upon the fact that . . . from the point of view of the third person the transaction seems regular on its face and the agent appears to be acting in the ordinary course of the business confided to him.' ") (quoting *Restatement* § 261, Comment *a*).

IV. Common v. Uncommon Law

If there is an unusual aspect to any of the separate approaches issued today, it is one suggesting that we should look to state common law to determine when and under what conditions an employer is vicariously liable for a supervisor's sexual harassment. Presumably this would mean that we often would be faced with a choice of law question. We might impose liability on an employer in one case, but not another though the facts of the two cases were the same. We would explain this disparate impact by saying that though we are a federal court applying the civil rights laws of the nation (here, Title VII), and though Congress surely intended all citizens to have equal rights under that federal statute, we think it best to allow the particulars of local interests to control federal court decisions.

The suggestion that we look to state law to resolve sensitive issues under the civil rights laws contradicts the general assumption that " 'in the absence of a plain indication to the contrary, . . . Congress when it enacts a statute is not making the application of the federal act dependent on state law.' " *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S.

30, 43, 109 S.Ct. 1597, 104 L.Ed.2d 29 (1989) (quoting *Jerome v. United States*, 318 U.S. 101, 104, 63 S.Ct. 483, 87 L.Ed. 640 (1943)). "One reason for this rule of construction is that federal statutes are generally intended to have uniform nationwide application." *Id.* This is why in *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 64 S.Ct. 851, 88 L.Ed. 1170 (1944), the United States Supreme Court rejected an argument that the term "employee" as used in the National Labor Relations Act (Wagner Act) should be defined by state law. It explained:

> Both the terms and purposes of the statute, as well as the legislative history, show that Congress had in mind no . . . patchwork plan for securing freedom of employees' organization and of collective bargaining. The Wagner Act is . . . intended to solve a national problem on a national scale. . . . Nothing in the statute's background, history, terms or purposes indicates its scope is to be limited by . . . varying local conceptions, either statutory or judicial, or that it is to be administered in accordance with whatever different standards the respective states may see fit to adopt for the disposition of unrelated, local problems.

322 U.S. at 123. Because the NLRA was the model for much of Title VII, *Lorance v. AT & T Technologies, Inc.*, 490 U.S. 900, 909, 109 S.Ct. 2261, 104 L.Ed.2d 961 (1989), it follows that the reasons favoring a uniform national standard under the NLRA would support similar uniformity in our enforcement of Title VII. We should avoid the same "patchwork plan" of "varying local conceptions" governing civil rights laws that the Supreme Court sought to avoid under the NLRA. *See id.* ("[W]e have often observed that the NLRA was the model for Title VII's remedial provisions, and have found cases interpreting the former persuasive in construing the latter.").

Despite Congress' (and the Supreme Court's) seemingly clear preference that we favor a uniform national standard of employer liability rather than a 50-state standard wrapped in local common law, some of my colleagues would look to those local laws to determine when a supervisor acts within the "scope of his employment." But in interpreting the very same term under a different federal statute (the Copyright Act of 1976), the Supreme Court unequivocally (and unanimously) rejected that approach:

> In past cases of statutory interpretation, when we have concluded that Congress intended terms such as "employee," "employer," and "scope of employment" to be understood in light of agency law, we have relied on the general common law of agency, *rather than on the law of any particular State, to give meaning to these terms*. . . . This practice reflects the fact that "federal statutes are generally intended to have uniform nationwide application." *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 43, 109 S.Ct. 1597, 104 L.Ed.2d 29 (1989).

Community for Creative Non-Violence v. Reid, 490 U.S. 730, 740, 109 S.Ct. 2166, 104 L.Ed.2d 811 (1989) (emphasis added). *Meritor* instructed us to look to "common law [agency] principles" to determine the scope of an employer's liability. Only three years later, *Reid* interpreted nearly identical language—the general "common law of agency"—as *ruling out* reliance "on the law of any particular State," which is exactly what some of my colleagues propose to do. For those who favor a 50-state standard of "scope of employment," *Reid* is seemingly insurmountable.

Finally, it is worth noting that already this year the Supreme Court has decided two cases of statutory interpretation under Title VII. *See Robinson v. Shell Oil Co.*, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997) (unanimously holding that the term

"employees," as used in the anti-retaliation provision of Title VII, includes former employees); *Walters v. Metropolitan Educ'l Enterprises, Inc.*, 117 S.Ct. 660, 136 L.Ed.2d 644 (1997) (unanimously favoring payroll method to determine how many employees employer "has" on day in question). In neither case did the Court look to state law to inform its interpretation of Title VII terms.

Ultimately, the scope and purpose of Title VII resolve the issue as to whether state common law should prevail. The primary purpose of the Civil Rights Act of 1964 was to rid the workplace of discrimination. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973) ("The language of Title VII makes plain the purpose of Congress to ensure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens."). I hardly think Congress intended to be successful only in so far as its efforts comported with state law. What happens when the Equal Employment Opportunity Commission, specifically empowered under 42 U.S.C. § 2000e-5 to enforce the provisions of Title VII by suing an employer on its own, files suit against an employer in federal court? Must the Commission turn to state law to support its claim of discrimination? It would seem odd that a federal agency's success in seeking the enforcement of a federal statute in federal court would depend upon state law.

Conclusion

Of all the approaches suggested by various members of the court today, given the present state of the law, Chief Judge Posner's approach would provide a consistent, uniform standard concerning when an employer is liable for a supervisor's sexual harassment. Where the supervisor commits a "company act," such as firing an employee who

refuses to have sex with him, the employer is strictly liable. But when a supervisor's sexual harassment has nothing to do with his position (though technically it occurs during the course of his workday), the standard of employer liability should be one of negligence. The issue becomes whether the employer knew or should have known of the harassment, what it could have done to prevent it, and, of course, what it did to remedy it. We need not muddy the playing field by asking whether the supervisor was acting within the scope of his employment because it would be difficult to envision a scenario where he was (see *supra*, Pt.II). But even if we were to ask such a question, it would make little sense to condition the answer on the law of any particular state. In banning state literacy tests by passing the Voting Rights Act Amendments of 1970, Congress recognized that discrimination was a "*national* dilemma that touche[d] every corner of our land," and further determined "the way to solve the problems of racial discrimination [was] to deal with nationwide discrimination with nationwide legislation." *Oregon v. Mitchell*, 400 U.S. 112, 133, 91 S.Ct. 260, 27 L.Ed.2d 272 (1970). The same could be said about Title VII. Its standards ought to be accessible and uniform; in other words, they ought to be common. For all of these reasons, I join the Chief Judge's opinion.

DIANE P. WOOD, *Circuit Judge*, joined by EASTERBROOK and ROVNER, *Circuit Judges*, concurring and dissenting. Today the *en banc* court establishes two propositions of great importance for all future claims of sexual harassment by a supervisor. First, a majority of judges agrees that both Kimberly Ellerth and Alice Jansen properly preserved all aspects of their claims of sexual harassment in their EEOC filings and district court complaints. (In addition to this opinion, see also opinions of Chief Judge Posner, Judge Flaum, and Judge Easterbrook.) Second, a majority of judges supports a rule under which employers will be liable when their supervisory employees, acting within the scope of their employment or their delegated authority, engage in "*quid pro quo*" sexual harassment. In keeping with the panel opinion in *Ellerth v. Burlington Industries, Inc.*, 102 F.3d 848 (7th Cir.1996) (Bauer, Rovner, and D. Wood), I analyze this as a problem of agency law, under which acts of "*quid pro quo*" harassment will almost always fall within the scope of the supervisor's employment and thus result in employer liability under a *respondeat superior* theory. Other members of the court have offered their own explanations. Judge Flaum concludes that employer liability is "automatic" once the plaintiff shows that the supervisor conditioned employment consequences upon the receipt of sexual favors by wielding the authority actually delegated to him, and Chief Judge Posner has shown why this is an efficient outcome.

The important point is that a majority of the court agrees on several fundamental propositions. A plaintiff must prove that (1) the harasser had supervisory authority over her or him, (2) the employer authorized the supervisor to confer the tangible employment benefit in question (*i.e.*, the "*quid*"), and (3) the supervisor demanded sexual favors as the price of that benefit. Furthermore, a majority of the *en banc* court agrees that the employer cannot escape liability in "*quid pro quo*"

cases merely by showing that it has a policy against sexual harassment. These are important developments in this circuit's sexual harassment law, which should not be overshadowed by our remaining differences.

Finally, a majority of the *en banc* court agrees that both Ellerth (if she did not waive the point) and Jansen brought forward enough evidence to survive summary judgment on their claims that their respective supervisors created hostile work environments through acts of sexual harassment.[1] (Whether Ellerth waived her right to rely on that theory is a separate question on which we disagree. I think not, for reasons I address in the final section of this opinion.) The majority has not, however, reached a consensus on the appropriate legal framework for this class of cases. In my view, the rules governing employer liability under Title VII for a supervisory employee's behavior do not depend on the kind of discriminatory or harassing conduct in which the supervisor has engaged; employer liability depends instead on whether the supervisor is acting within the scope of his authority, as I explain more fully below. I would therefore remand both cases for further proceedings.

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[1] The opinions of Chief Judge Posner, Judge Flaum, Judge Easterbrook, added to mine, lead to this result in Jansen's case. With respect to Ellerth's case, we must recall that the district court found that she had produced enough evidence to show a hostile environment; it rejected her claim on other grounds. Under this circuit's law, a district court's finding of a hostile environment is reviewed under the clearly erroneous standard if the court correctly stated the applicable law. See *Daniels v. Essex Group, Inc.*, 937 F.2d 1264, 1269-70 (7th Cir.1991). As I understand their opinions, both Chief Judge Posner and Judge Flaum do not think that the district court clearly erred on this point; rather, they have concluded that Ellerth's reference to the Restatement (Second) of Agency in this court amounted to a waiver of the right to present a negligence theory.

The agency analysis I would use is consistent with any theory of discrimination that could be asserted under Title VII. Simply put, when a supervisory employee, acting within the scope of his authority as determined under the applicable state law, engages in discriminatory conduct, the employer should be liable under well recognized principles of *respondeat superior*, whether those acts are characterized for analytical purposes as "*quid pro quo*" demands, the infliction of a "hostile environment," or other discriminatory acts. The employer should also be liable when the supervisor acts within the scope of his apparent authority to take the employment actions in question: hiring, firing, assigning tasks, or controlling the workplace environment. Conversely, if the supervisor uses neither actual nor apparent authority to take the employment action, then the employer should be liable only if the plaintiff shows that the employer knew or should have known about the harassing behavior. This approach is consistent with both the statute and the Supreme Court's decisions in *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986), and *Harris v. Forklift Sys. Inc.*, 510 U.S. 17, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993). It gives the district courts the manageable task of deciding questions of scope of authority instead of imposing on them the impossible task of parsing a supervisor's every act to see if it belongs in the "*quid pro quo*" or the "hostile environment" category. Finally, it allows employers to contest the plaintiff's claim that the supervisor acted within the scope of his authority or abused his delegated authority. It therefore respects the Supreme Court's admonition in

Meritor not to impose "strict liability" on employers in this area.[2]

I

Before addressing the particular facts of the cases before us, it is useful to take a broader look at the legal principles that will govern them. Two fundamental issues arise. First, for purposes of employer liability, is there a principled distinction between "*quid pro quo*" and "hostile environment" claims? Second, under what circumstances will an employer be liable for the sexually harassing acts of its supervisory employees?

A. Forms of Sexual Harassment

Title VII prohibits discrimination on the basis of an individual's "race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a). In both *Meritor* and *Harris*, the Supreme Court recognized that sexual harassment is a form of sex discrimination. It also recognized that sexual harassment is not confined to actions of the "*quid pro quo*" variety, in which someone demands sexual favors in exchange for a tangible job benefit or the promise of such a benefit. Sexually harassing actions that create a "hostile work environment" also fall within the statutory prohibition of sex discrimination. Similarly, courts have recognized that

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[2] Some of my colleagues have chosen to characterize my approach as one that *de facto* creates "strict liability" for employers whose supervisory employees engage in acts of sexual harassment. I do not wish to engage in a debate over labels. In keeping with the Supreme Court's direction to "look to" agency principles in this area, I have outlined an approach that would impose *respondeat superior* liability in some instances and relieve the employer of such liability in others. This is not the "strict liability" that the Supreme Court rejected in *Meritor*, under which a plaintiff could hold an employer liable simply by proving the existence of the supervisory relationship.

discrimination based on race might take the form of a hostile work environment, see, *e.g.*, *Rodgers v. Western-Southern Life Ins. Co.*, 12 F.3d 668, 673 (7th Cir.1993); *Daniels v. Essex Group, Inc.*, 937 F.2d 1264, 1270 (7th Cir.1991).

In the real world, sexual harassment does not sort itself into tidy categories. The same woman might be subject to both kinds of harassment from her supervisor at the very same time: he might repeatedly order her to his office, close the door, and stroke her leg, and on each occasion he might tell her that promotions will occur more readily if she has sex with him. The former conduct (made possible by the fact of his authority over her) would fall within the "hostile environment" category, but the latter would clearly be "*quid pro quo*" harassment. A rule making the employer strictly liable for part of this encounter, but liable only for negligence with respect to the other part, would make neither legal nor practical sense. This is because, unlike the example Chief Judge Posner suggests of the drunken worker who first injures a customer and later hits a pedestrian, in the harassment case the offending supervisor inflicts injury on a single victim, through a single act or course of conduct, and thus violates only one legal right. When this supervisor bombards an unwilling subordinate with unwanted sexual images, touching, vulgar words, or denigrating comments, only the most committed formalist would feel confident in saying when those actions cross the imaginary line from "hostile environment" harassment to "*quid pro quo*" harassment. By the same token, when the supervisor makes constant demands for sex in exchange for job benefits (maybe in jest, maybe not), the victim surely suffers from a "hostile environment" at the same time as she endures the "*quid pro quo*" harassment.

As Judge Flaum and those who have joined his opinion recognize, a supervisor is able to harass in a variety of ways:

he might attempt to use his supervisory authority to obtain sexual favors from a subordinate employee in a form of sexual blackmail; he might use his supervisory authority to create a "hostile environment" for the subordinate, requiring her presence while offensive language or behavior goes uncorrected or even encouraged; or he might offend in the same way as an obnoxious co-worker or stranger, in circumstances where the authority he wields in the company is irrelevant. The first two cases are both forms of sex discrimination made possible by the employer's delegation of authority to the supervisor; the third is harassment unrelated to the delegated authority. The critical question, for purposes of employer liability, turns on whether the supervisor has abused the powers the employer has entrusted to him; it does not turn on the way in which the supervisor has decided to abuse them.

A majority of this court would nonetheless make the employer's liability for a supervisor's actions depend on the artificial distinction between "*quid pro quo*" and "hostile environment" harassment. As the *per curiam* opinion reports, for actions that fall on the "*quid pro quo*" side of the line they would find the employer strictly liable, while for actions on the "hostile environment" side of the line they would find liability only if the employer was negligent. Such an approach relies on a line that will often be impossible to draw in supervisory harassment cases. Worse, it conflates two distinct inquiries: what counts as discrimination for purposes of Title VII, and when must the employer answer for it? There is nothing to justify the assumption that a supervisor's actions will be all one type or all another in each individual case; indeed, the facts of *Jansen* and *Ellerth* show that this is not likely to be true. If the statute itself spoke in terms of different types of sexual harassment and called for different liability rules, we would be bound to follow it and to do the

best we could. But the statute does no such thing. Nowhere does it suggest that the question of who speaks for the employer depends on the type of discrimination (sexual harassment, other sex discrimination, race discrimination, etc.) at issue.

One argument for superimposing such a distinction on the statutory language rests on the empirical assumption that employers' ability to monitor will vary depending on the type of harassment at issue. Chief Judge Posner has suggested (and I agree) that a strict liability rule would generally cause an employer to monitor the supervisor's behavior more closely. Nonetheless, he attempts to limit the force of this observation to the "*quid pro quo*" situation, postulating that (1) employers are better able to police the "*quid pro quo*" variety of harassment (on the assumption that multiple layers of bureaucratic review will constrain a supervisor's "*quid pro quo*" actions), (2) these same layers of review will be ineffective for hostile environment claims, and (3) most claims will be filed against large companies. Putting to one side the assumption that the normal Title VII defendant will have all the layers of review on which he relies, there is no reason to believe that employers have so few tools against supervisors whose discriminatory actions inflict a "hostile environment" on subordinates. It is worth recalling how unbearable the workplace must become in order to be "hostile" as to be actionable under Title VII. The Supreme Court defined a hostile work environment as one "permeated with discriminatory intimidation, ridicule, and insult . . . that is sufficiently severe or pervasive to alter the conditions of the victim's employment." *Harris*, 510 U.S. at 21 (internal quotations and internal citation omitted). Compare *Saxton v. American Telephone & Telegraph Co.*, 10 F.3d 526, 533-35 (7th Cir.1993) (co-worker on different occasions rubbing leg, kissing, and leaping out at employee from behind a bush not

sufficiently severe or pervasive); *Hennessy v. Penril Datacomm Networks, Inc.*, 69 F.3d 1344, 1353- 54 (7th Cir.1995) (fellow employee's taking victim to striptease bar, shouting for her to get up and perform, comparing her breasts to those of the dancers, and propositioning her would not have been enough, standing alone, for a claim).

Employers are quite capable of monitoring a supervisor's actions affecting the work environment without engaging in Orwellian surveillance. The alternative requirements for liability of sufficient severity or pervasiveness give focus to the employer's efforts to ensure that its supervisors are not engaged in blatantly harassing acts or an ongoing pattern of significant sexual harassment, or for that matter acts of racial discrimination, conventional sex discrimination, or a host of other undesirable behaviors. Nothing systematic makes this kind of severe or pervasive condition harder to detect than a single, clearly unacceptable, act of "*quid pro quo*" harassment, which could easily occur behind closed doors with only the supervisor and the victim as witnesses. The relative advantage the employer has over the courts in bringing about a harassment-free workplace does not vary depending on the type of harassment. In addition, making it clear that employers must answer for their supervisors acting within the scope of the authority delegated to them will increase the deterrent power of Title VII, by leading employers to improve their training and supervision of these employees.

Just as the statutory language and empirical considerations do not support investing the distinction between types of harassment with the weight most of my colleagues would give it, neither do the Supreme Court's decisions in this field. In *Meritor* the Supreme Court announced that the lower courts were to look to agency principles to determine when an employer would be liable for a supervisor's sexual

harassment. *Meritor* itself was argued as a hostile work environment case before the Court, but the record shows that the supervisor had actually engaged in both types of harassment. Notably, the Court did not distinguish between the two varieties of harassment when it came to discuss employer liability. Instead, it stated that:

> Congress wanted courts to look to agency principles for guidance in this area. While such common-law principles may not be transferable in all their particulars to Title VII, Congress' decision to define "employer" to include any "agent" of an employer, 42 U.S.C. § 2000e(b), surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible.
>
> For this reason, we hold that the Court of Appeals erred in concluding that employers are always *automatically* liable for sexual harassment by their supervisors. See generally Restatement (Second) of Agency §§ 219-237 (1958). For the same reason, *absence of notice to an employer does not necessarily insulate that employer from liability*.

477 U.S. at 72 (emphasis added). This passage is phrased entirely in terms of Title VII as a whole, indicating that the Court was not creating a rule specific to sexual harassment cases—let alone "hostile environment" sexual harassment cases—but was instead construing the entire statute to require reference to agency principles. In addition, the *Meritor* Court viewed agency principles as *limiting*, not expansive, factors in determining liability, as compared with the strict liability rule the lower court had adopted there.

It is true that Judge Flaum's approach more nearly accords with that of the Third, Sixth, Ninth, and Tenth Circuits, which have not questioned the legal basis of the distinction

between "*quid pro quo*" and "hostile environment" claims. That distinction is now some eighteen years old, dating from Catherine MacKinnon's pathbreaking book on *Sexual Harassment of Working Women*, published in 1979. Those courts, now joined by a majority of this court, have decided to make employer liability in this one area of Title VII law turn on the type of conduct at issue as well as the relationship between employer and employee.[3] See *Nichols v. Frank*, 42 F.3d 503, 513 (9th Cir.1994); *Bouton v. BMW of North America*, 29 F.3d 103, 106 (3d Cir.1994); *Sauers v. Salt Lake County*, 1 F.3d 1122, 1127 (10th Cir.1993); *Kauffman v. Allied Signal, Inc.*, 970 F.2d 178, 183 (6th Cir.1992). In my view, however, those courts have not taken to heart the Supreme Court's admonition in *Meritor* to look to agency principles in Title VII cases. What they have called "strict liability" for "*quid pro quo*" cases is, in fact, nearly identical to the result produced by properly applied agency principles. As such, I have no quarrel with the results these courts have reached. In fact, *Karibian v. Columbia Univ.*, 14 F.3d 773, 780 (2d Cir.1994), and *Faragher v. City of Boca Raton*, 111 F.3d 1530, 1536 (11th Cir.1997) (*en banc*), suggest that the Second and Eleventh Circuits have moved toward a uniform mode of analyzing employer liability for all sexual harassment. In *Faragher*, the Eleventh Circuit held that:

> an employer may be held indirectly, or vicariously, liable for hostile environment sexual harassment: (1) when a harasser is acting within the scope of his employment in perpetrating the harassment, see *Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554, 1558 (11th Cir.1987)

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[3] It is regrettable indeed, and a commentary on the difficulty victims of sexual harassment have faced in having their claims taken seriously, that sex discrimination taking the form of harassment has been singled out for this uniquely disadvantageous treatment.

> (citing Restatement (Second) of Agency § 219(1)); and (2) when a harasser is acting outside the scope of his employment, but is aided in accomplishing the harassment by the existence of the agency relationship. *Sparks*, 830 F.2d at 1559-60 (citing Restatement (Second) of Agency § 219(d)).

111 F.3d at 1536 (footnotes omitted, parentheticals in original).[4] In *Sparks*, cited approvingly in *Faragher*, the plaintiff's sexual harassment claim was factually similar to Ellerth's.[5] In both *Faragher* and *Sparks*, the Eleventh Circuit relied on agency principles to assess the claims before it; it did not purport to impose "strict liability" on the employer.

B. Employer Liability for Supervisor's Actions

What, then, are the governing "agency principles" and where do we find them? As I indicate below, I agree with Judge Easterbrook that state law must furnish the rule of decision here, but even if we were creating a new federal common law of agency, it would be necessary to ground those rules in something. Chief Judge Posner has launched a broadside attack on the Restatement (Second) of Agency, noting that it is not a statute and need not be treated as "The Way." Few would disagree with that proposition. The Restatement nevertheless stands as a useful reference point for the common law of agency, and its principles have been

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[4] The majority of the *Faragher* court took a narrow approach to the question of scope of employment and ordered the dismissal of the plaintiffs' claims, while the dissents of Judge Barkett and Judge Anderson took an approach more in line with mine.

[5] Sparks' supervisor had called her into his office to ask if she was married and if she could become pregnant, subjected her to unwelcome touching, and told her things like "you'd better be nice to me," and "your fate is in my hands."

adopted by many state and federal courts as they have engaged in the very common law process he describes. See, *e.g.*, *Haddon v. United States*, 68 F.3d 1420, 1423-24 (D.C.Cir.1995); *Lehman v. Toys 'R' Us, Inc.*, 132 N.J. 587, 626 A.2d 445, 461-64 (N.J.1993); *Hinshaw v. Board of Comm'rs of Jay County*, 611 N.E.2d 637, 640 (Ind.1993); *Olson v. Connorly*, 156 Wis.2d 488, 457 N.W.2d 479, 483-84 (Wis.1990); *Deal v. Byford*, 127 Ill.2d 192, 130 Ill.Dec. 200, 537 N.E.2d 267, 272-73 (Ill.1989).

I see no reason to disregard the accumulated body of agency law that accepts the Restatement's propositions, any more than I would disregard state law developments that move beyond it. We owe respect to all of the varying sources of agency law to which the Supreme Court directed our attention in *Meritor*. The harder question, as Judge Easterbrook has pointed out, is to ascertain *which* body of agency law governs our interpretation of 42 U.S.C. § 2000e(b) (making employers liable for acts of their "agents," see *Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417, 1422 (7th Cir.1986)):(1) a new federal common law of agency, applicable only to sexual harassment cases and invented out of whole cloth; (2) a federal common law of agency that borrows its rules from the appropriate state law; or (3) state law directly. As Judge Easterbrook has argued at greater length, the first of these options is inappropriate in light of the Supreme Court's recent reiteration of the rule that state law should be incorporated as the federal rule of decision (when a statute is silent) in the absence of a significant conflict with, or threat to, a national interest. See *Atherton v. FDIC*, 117 S.Ct. 666, 673, 136 L.Ed.2d 656 (1997); see also *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 740, 99 S.Ct. 1448, 59 L.Ed.2d 711 (1979). It is hard to see how the need for national uniformity is any greater for the definition of the term "agent" in Title VII than it is in many other areas where federal courts

routinely turn to state law for underlying property and contract rules. For example, the tax and bankruptcy laws—matters of intense national interest—rely on state laws to determine whether property rights have been created and the extent of those rights. See *United States v. National Bank of Commerce*, 472 U.S. 713, 722, 105 S.Ct. 2919, 86 L.Ed.2d 565 (1985) ("[I]n the application of a federal revenue act, state law controls in determining the nature of the legal interest which the taxpayer had in the property"); *Butner v. United States*, 440 U.S. 48, 54 & n. 9, 99 S.Ct. 914, 59 L.Ed.2d 136 (1979) ("Notwithstanding this requirement as to uniformity the bankruptcy acts of Congress may recognize the laws of the state in certain particulars, although such recognition may lead to different results in different States.") State laws also determine if a state employee serves "at will" or not in § 1983 cases, see *Border v. Crystal Lake*, 75 F.3d 270, 273 (7th Cir.1996); and federal courts use state statutes of limitations for cases under 42 U.S.C. §§ 1981 and 1983. See, *e.g.*, *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 462, 95 S.Ct. 1716, 44 L.Ed.2d 295 (1975); *Robertson v. Wegmann*, 436 U.S. 584, 590-91, 98 S.Ct. 1991, 56 L.Ed.2d 554 (1978). See also the examples cited in Judge Easterbrook's opinion at 141-42.

I agree with Judge Easterbrook that the law governing the question who is an agent of an employer for Title VII purposes must be, under these cases, state law. To his discussion, I add only two observations. First, the administrative consequences of his point about "vertical" uniformity should not be underestimated. The existence of side-by-side, but inconsistent, federal and state rules on employer responsibilities for acts of their supervisory agents will make it exceedingly difficult for employers in Illinois, Indiana, and Wisconsin (not to mention other states) to establish a single coherent management structure. Second,

the majority's rejection of *respondeat superior* liability for supervisory "hostile environment" cases means that the same woman who under state law will be able to hold her employer liable for a supervisor's violation of state civil rights statutes or for state torts will find her way to federal court barred. Victims of sexual harassment should be aware that the majority's approach has made them second-class citizens, both vis—vis their counterparts with state law claims and vis—vis other Title VII plaintiffs.

The law of agency, as the Supreme Court recognized in *Meritor*, is best suited to provide the answer to the question of when the employer must answer for the supervisor's actions, no matter what the supervisor's behavior. For present purposes, I discuss agency principles generally rather than undertaking a specific examination of Illinois's rules, both because I have no reason to believe that Illinois is an outlier on these matters and because in my view a detailed examination of Illinois's rules would be better performed in light of a more complete record. As reflected in Restatement § 219, agency law typically draws a fundamental distinction between acts within the scope of an agent's employment and acts outside the scope of employment. An initial question before us today is how, if at all, that structure applies to the relationship between a supervisory employee of a principal (the employer) and a subordinate employee of the same principal. A second preliminary question is whether this analysis operates differently in Title VII cases from the way it normally applies for other torts. When one considers the tripartite relationship among employer, supervisor, and subordinate employee, fully taking into account the responsibilities each has, the ability of each to take corrective action, and the incentive each has to act, the conclusions are inescapable that (a) general principles of traditional agency law provide a suitable analytical structure, and (b) nothing in

the law of discrimination requires modification of this analysis.

The key relationship for the cases before us is the one between the employer and the supervisory employee, for the simple reason that the question is whether the employer should be liable for the supervisor's actions. Under established principles of law, the relationship between employer and supervisory employee is plainly that of principal to agent. See *Moy v. County of Cook*, 159 Ill.2d 519, 203 Ill.Dec. 776, 640 N.E.2d 926, 927 (Ill.1994); *Kansallis Finance Ltd. v. Fern*, 421 Mass. 659, 659 N.E.2d 731, 733-34 (Mass.1996); *Ruiz v. Conoco*, 868 S.W.2d 752, 762-64 (Tex.1994); *Western Elec. Co. v. Brenner*, 41 N.Y.2d 291, 392 N.Y.S.2d 409, 360 N.E.2d 1091, 1094 (N.Y.1977); Restatement (Second) of Agency § 218. In old- fashioned agency parlance, the employer is the "master" and the supervisory employee is the "servant." However denominated, the agency relationship exists for functional reasons: the employer hired the supervisory employee to perform specified tasks for the employer, and the employer controls or has the right to control the supervisor's conduct in performing these tasks. See *Leon v. Caterpillar Indus., Inc.*, 69 F.3d 1326, 1333 (7th Cir.1995); *United States v. Balistrieri*, 981 F.2d 916, 930 (7th Cir.1992); *Valenti v. Qualex, Inc.*, 970 F.2d 363, 368 (7th Cir.1992); *Central States Trucking Co. v. J.R. Simplot Co.*, 965 F.2d 431, 433 (7th Cir.1992). Occasionally the question arises whether the "control" element is weak enough that the agent should be characterized as an independent contractor, see *Kittlaus v. United States*, 41 F.3d 327, 330 (7th Cir.1994), but that is plainly not an issue in these cases, and will virtually never be an issue in the modern business firm where the employee receives a salary for her services.

It is important to bear in mind that Title VII itself applies to all but the smallest business enterprises in our economy. Thus, when we consider the principal/agent relationship between employer and supervisor, we may be speaking of anything from a 692,800-employee company like General Motors, see Hoover's Handbook of American Business, vol. 1, at 659 (1996), with countless layers of management between the CEO and the line employees, to a firm that barely meets the jurisdictional minima required for Title VII. *Cf. Walters v. Metropolitan Educational Enterprises*, 117 S.Ct. 660, 136 L.Ed.2d 644 (1997) (describing how to compute whether an employer has 15 employees over a 20-week period annually, as required by 42 U.S.C. § 2000e(b)). Our approach must therefore be flexible enough to cover the incredible diversity of employers that fall within the ambit of the statute.

How, if at all, should the employer's responsibility for the supervisor's actions be affected if the victim of the supervisor's conduct happens also to be employed by the firm and under the supervisor's control? The employer's knowledge that one employee is under the supervision of another (to the extent dictated by the employer's own policies) certainly makes injury from the supervisor to the subordinate more foreseeable to the employer than injury to a stranger. That only underscores the importance of placing the responsibility on the employer to monitor the supervisor's job-related actions to ensure that he is not abusing the powers entrusted to him. Rather than assuming that subordinate employees have better access than, say, customers to a firm's internal mechanism for resolving discrimination complaints (although even that notion is questionable, since well-run companies normally offer complaint avenues for their customers) we should ask what job-related harm is foreseeable and who is in the best position to prevent it.

Typically, we distinguish between persons who are able to contract around potential injury from a transaction and those who are strangers. On that basis, the subordinate employee stands in a position much closer to the stranger, since no amount of contracting can prevent her from becoming the victim of a supervisor's sexual harassment. See Alan O. Sykes, The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment Rule and Related Legal Doctrines, 101 Harv. L.Rev. 563 (1988); Alan O. Sykes, The Economics of Vicarious Liability, 93 Yale L.J. 1231 (1984). Even the common law "fellow servant" rule did not bar recovery against the employer when the injury occurred at the hands of a "vice-principal," who could be anyone to whom the master had delegated his common law duties. See Prosser and Keeton on Torts, § 80, at 572 (5th ed.1984). By analogy, the subordinate suffers injury from a "vice- principal"—literally, one who stands in the place of the principal—when a supervisor harasses her.[6] Whether seen from the vantage point of foreseeability or in light of the turn-of-the-century "fellow servant" rule, employer liability follows.

If the injury flows from an intentional tort committed by the employee, such as the use of force or defamation, the employer will still be liable if the act was not unexpectable given the employee's duties. See, *e.g.*, *Deal*, 130 Ill.Dec. 200, 537 N.E.2d at 272-73 (apartment complex owner liable for apartment inspector's attack on tenant); *Aliota v.*

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[6] Some nominal supervisors may have authority that is limited enough that little if any of their harassing acts would fall within the scope of their authority or be aided by their supervisory position. In those cases, which may correspond roughly to the classic "superior servant" agency concept, the court would apply a negligence rule to any act that was outside the scope of authority.

Graham, 984 F.2d 1350, 1358-59 (3d Cir.1993) (employer can be liable for defamation); *Molton v. City of Cleveland*, 839 F.2d 240, 249 (6th Cir.1988) (city potentially liable because police officer's assault and battery were not unexpectable); *Rawling v. City of New Haven*, 206 Conn. 100, 537 A.2d 439, 443 (Conn.1988) (genuine fact question whether police officer was acting within the scope of his employment when he committed a sexual assault); *Daigle v. City of Portsmouth*, 129 N.H. 561, 534 A.2d 689, 700 (N.H.1987) (tortious or criminal character of officer's acts does not automatically remove them from scope of employment). See generally Restatement §§ 245, 247. These cases demonstrate that an intentional tort is not as a matter of law unforeseeable or outside the scope of employment. (I note as well that the injuries suffered by victims of sexual harassment can include both severe psychological harm and pecuniary injury from decreased productivity and loss of job opportunities. We should not trivialize the harm that harassment can inflict.)

Neither this court nor any other has had any trouble applying these agency principles to the various claims of discrimination apart from sexual harassment that are cognizable under Title VII and related laws. See, *e.g.*, *Hennessy*, *supra*, 69 F.3d 1344 (termination based on sex or pregnancy); *Balistrieri*, *supra*, 981 F.2d 916 (race discrimination in housing context); *Miranda v. B & B Cash Grocery Store, Inc.*, 975 F.2d 1518 (11th Cir.1992) (disparate pay based on gender); *Hunter*, *supra*, 797 F.2d 1417 (race discrimination); *Young v. Southwestern Sav. & Loan Ass'n*, 509 F.2d 140 (5th Cir.1975) (hostile religious environment). Sexual harassment is no different and no harder to detect than other forms of discrimination. We know well that all forms of discrimination can be practiced subtly as well as blatantly. If an African-American employee charges racial

discrimination and wants to prove it by showing that her supervisor routinely used racial epithets when talking to her, she would face the same evidentiary problems as she would if the charge were either "hostile environment" or "*quid pro quo*" sexual harassment. Evidentiary concerns are appropriately addressed through the summary judgment process, not by engrafting liability standards onto the law that the language of the statute does not support.

Agency principles therefore apply in Title VII cases for purposes of deciding when an employer must answer for its supervisory employees' discriminatory acts to the same extent they do elsewhere. The first question in any case dealing with a supervisor's harassment should be whether the supervisor's action was within the scope of his employment. In order to answer that factual question, criteria like those suggested in Restatement (Second) §§ 228 and 229 are useful benchmarks. Section 228 is worth quoting in its entirety, as a useful summary of the concept of "scope of employment" and how it differs from the idea of "strict liability":

> (1) Conduct of a servant is within the scope of employment if, but only if:
>
> (a) it is of the kind he is employed to perform;
>
> (b) it occurs substantially within the authorized time and space limits;
>
> (c) it is actuated, at least in part, by a purpose to serve the master; and
>
> (d) if force is intentionally used by the servant against another, the use of force is not unexpectable by the master.
>
> (2) Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master.

In section 230, the Restatement repeats the well recognized rule that "[a]n act, although forbidden, or done in a forbidden manner, may be within the scope of employment." See *City of Chicago v. Matchmaker Real Estate Sales Ctr., Inc.*, 982 F.2d 1086, 1096 n. 12 (7th Cir.1992). See also *Aliota*, 984 F.2d at 1358; *Vlotho v. Hardin County*, 509 N.W.2d 350, 354 (Ia.1993); *Walker v. Crigler*, 976 F.2d 900, 904 n. 4 (4th Cir.1992); *Huddleston v. Union Rural Elec. Ass'n*, 841 P.2d 282, 292 (Colo.1992) (*en banc*); *Ermert v. Hartford Ins. Co.*, 559 So.2d 467, 476-77 (La.1990); *Pyne v. Witmer*, 129 Ill.2d 351, 135 Ill.Dec. 557, 543 N.E.2d 1304, 1309 (Ill.1989); *Yates v. Avco Corp.*, 819 F.2d 630, 636 (6th Cir.1987); *Simmons v. United States*, 805 F.2d 1363, 1369 (9th Cir.1986); *Dickenson v. Edwards*, 105 Wash.2d 457, 716 P.2d 814, 819 (Wash.1986) (*en banc*).

Contrary to Judge Flaum's suggestion in footnote 1 of his opinion, each of the four criteria described in § 228 imposes a meaningful limitation on the scope of employment, thereby ensuring that employers will not be held liable for the "frolics and detours" of their employees or for acts that are unforeseeable to the employer.[7] His criticisms of these criteria all focus so exclusively on the harassing behavior that they would exclude all "mixed motive" cases,

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[7] Indeed, the implication of his criticism here is that liability will be defeated in too many cases, because plaintiffs will have a hard time proving that harassing acts fall within the scope of employment, while at the same time the opinion argues that the approach I advocate would create liability that is too sweeping. Our job is not to find a rule that produces the "right" number of plaintiffs' or defendants' verdicts, however; it is to follow the law Congress has given us, interpreted as the Supreme Court has instructed. It is also worth recalling that any time the facts show that the supervisor has not acted within the scope of his employment, the plaintiff will still be free to try to prove employer negligence (which is the way most members of the court would treat "hostile environment" cases in any event).

notwithstanding the fact that agency law has always recognized this type of liability. The focal point must be the conduct the employer has hired the supervisor to perform. It is here that Burlington and Packaging Corporation take a misstep. They argue that courts must ask whether the supervisor was employed to commit the intentional tort of sexual harassment. All an employer has to do to prevail under their view—either to show the lack of actual authority or apparent authority—is to show that the supervisor was not employed for the purpose of engaging in sexual harassment. Merely to state this is to show what a preposterous standard it would be. We have already expressly held that "[a] principal cannot free itself of liability by delegating to an agent the duty not to discriminate." *Matchmaker Real Estate*, 982 F.2d at 1096. That principle applies with equal force here.

In my view, the proper inquiry on this point is whether the supervisor, acting at least in part with the purpose of serving the employer, committed the acts of harassment as he exercised the authority (actual or apparent) the employer conferred on him: hiring, firing, assigning work, disciplining other employees for harassing behavior, and the like. It may help to consider the authorized time and space limits to define which incidents were work-related, although in today's mobile world they are hardly conclusive. The question whether the supervisor's conduct is actuated, at least in part, by a purpose to serve the master is undoubtedly of central importance. Agency law has always made it clear that the employer is not liable for acts of the agent that exclusively serve the agent's personal interests, just as it has also made it clear that employers can be liable if the motives are mixed. The conduct of the supervisor that must be assessed is not the act of harassment in isolation, but instead his broader course of action. If the supervisor is engaged in his own business or is acting on his own time, then his acts will normally not be

within the scope of his employment unless he is acting with apparent authority. Finally, an intentional tort like sexual harassment plainly requires foreseeability. Some forms of sexual harassment are easily foreseeable, while other severe forms may be so far from the norm that the employer should not be held liable in the absence of negligence. In that connection, I believe that the Fourth Circuit may have gone too far in *Martin v. Cavalier Hotel Corp.*, 48 F.3d 1343 (4th Cir.1995), in finding violent rape to be something undertaken at least in part with the employer's interests in mind, and thus something foreseeable to the employer.

If a court determines that a supervisor was acting within the scope of his employment or abused his supervisory authority, then employer liability follows under the well-recognized principles of agency law noted above. If the court finds to the contrary, then it must consider whether the employer is liable under any other theory. Two possibilities exist. If the employer was negligent in addressing the sexual harassment, then every member of this court agrees liability follows. See, *e.g.*, *Zimmerman v. Cook County Sheriff's Dept.*, 96 F.3d 1017, 1018 (7th Cir.1996); *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428, 432 (7th Cir.1995); *Carr v. Allison Gas Turbine Div. Gen. Motors*, 32 F.3d 1007, 1012 (7th Cir.1994) (Coffey, J., dissenting on other grounds). (I fear that employers may be baffled by the "heightened duty of care" that Judge Flaum would impose under the rubric of negligence for hostile environment cases involving supervisors: does this mean closer monitoring? a more flexible notice requirement? a duty to take more extensive preventive measures? If this becomes the law of the Circuit, I predict a considerable period of uncertainty while we answer these and similar questions.) Alternatively, as I have already noted, if the supervisor had apparent authority to take the employment actions at issue—again, not apparent authority to

harass (which is impossible), but apparent authority to hire, assign, supervise, etc.—and no other limitation derived from agency law applies, then liability should result. Apparent authority is just the shadow of actual authority; it exists when third parties reasonably believe the principal gave the agent authority to conduct his affairs, even if no such agreement exists. (This means that the employer can take steps to negate the appearance of authority. Such steps might well show that the employee's belief in the supervisor's alleged power to promote or to fire, for example, would be unreasonable.) The existence of a policy against sexual harassment does not change this result, although it both can and should reduce the incidence of harassment and provide a mechanism for amicably resolving many claims.

No matter what the basis for employer liability, I do not disagree that a strong, credibly enforced policy against sexual harassment can affect a plaintiff's case at the damages stage. This is a highly fact-specific inquiry, however, which would arise only if a trier of fact found that liability existed for sexual harassment. It therefore has little bearing on the case before us today.

II

Proper application of the principles I have described requires an appreciation of the facts of the two cases before us. Both appeals come to us from grants of summary judgment on behalf of the respective employers. The following accounts of the facts are therefore taken in the light most favorable to the plaintiffs.

A. *Jansen v. Packaging Corporation of America*

Alice Jansen's experience as Al Antoni's secretary at the Tooling Services Department of Packaging Corporation of America (PCA) was not a happy one. Jansen was hired on August 2, 1991, to work for Antoni. As her supervisor,

Antoni was responsible for evaluating Jansen's performance (which determined her raises) and providing input into her hiring and firing. Antoni's objectionable behavior ran the gamut from sexually suggestive remarks and unwanted touching to the delay of tangible job benefits (and the threat of further "*quid pro quo*" actions). At work, he frequently asked Jansen what she thought about "quickies;" he told her there was time for a "quickie" while patting his crotch; he requested oral sex; and he bragged about his former secretary's willingness to give him "quickies." In September 1992, Antoni was responsible for completing a performance review of Jansen's work. Instead of returning the review promptly to the personnel department, Antoni held it back (along with Jansen's raise) for several months. Jansen made several inquiries about the review, to which Antoni responded by patting his crotch and saying, "I haven't forgotten about your review, it's on my desk."

In the end, Antoni gave her a "fully satisfactory" review and she received her raise, retroactive to September (although with no interest, as far as the record shows), but his harassing behavior did not stop. On January 19, 1993, Jansen filed a complaint about him, informing PCA's Human Resources Director, Paul Migala, that Antoni had made unwelcome sexual comments to her. Later the same day Migala and Hank Weil (Antoni's supervisor) met with Jansen to discuss her complaint. At that meeting, Jansen suggested contacting Sonja Marciciak to corroborate her allegations and noted that she had heard that Antoni's previous secretary, Vicki Krompton Wiley, had been subjected to the same kind of harassment. Jansen named two other employees who had sexual relationships with Antoni and gave Migala the informal log she had kept of Antoni's harassing actions. At the conclusion of the meeting, Migala assured Jansen that the company would investigate her claims thoroughly.

The investigation that ensued, however, was not what Jansen had in mind. It began with an interview of Antoni, who denied all of Jansen's allegations and accused her of inappropriate behavior. At that point, rather than following up with the names of people Jansen had provided, PCA interviewed nine other employees (including Marciciak). Marciciak confirmed that Antoni had once made an unwelcome sexual comment to her; that she had seen Vicki Wiley crying because of Antoni's comments about "blow jobs" and the like; and that Jansen had complained about Antoni to her. She could not directly corroborate any of the incidents with Jansen, however, for the simple reason that she had not seen them. The other people that PCA interviewed (in lieu of Jansen's suggested witnesses) were similarly unable to back up Jansen's story directly. The investigation also focused on Antoni's accusations about Jansen. Ultimately, Migala and Weil decided that the evidence of Antoni's sexual harassment was inconclusive. They passed that word along to Jansen in a meeting, and at the same time they told her that their investigation had uncovered some potentially improper conduct on her part as well. At that time, they gave Jansen a copy of the company's sexual harassment policy. They also counseled Antoni about sexual harassment, notwithstanding their "inconclusive" investigation.

This was not the first time PCA had heard complaints about Antoni's behavior. Tami Long had been Antoni's secretary before Wiley. Long testified that soon after she started work at PCA, in December 1987, Antoni began making crude and suggestive remarks to her, eventually asking her to engage in oral sex. At one point, PCA's director of personnel called Long into her office to discuss reports of Antoni's sexual harassment. Long complied, but asked the director not to launch a formal investigation into the charges. Instead, the

director "counseled" Antoni "without directly accusing him." The evidence also indicates that PCA knew that Wiley also had significant problems working for Antoni. Although she never complained directly to management about Antoni, Wiley told Migala when she left the company that it was "because of a personal conflict with Al Antoni," and that "another woman should not be put in that environment and have to go through what I did." Migala got the message. Following Wiley's resignation, Migala directly counseled Antoni (again) about sexual harassment. Jansen's complaint was thus at least the third time the company had heard about Antoni's proclivities.

After Jansen's complaint, Antoni began treating her differently. He took a "work to rule" approach to subjects like explaining her absence when she left her desk and made her the only secretary required to take her lunch break between 12:00 p.m. and 12:30 p.m. (the others could take their half-hour lunch breaks at their discretion). He stripped her of responsibilities such as answering his telephone calls and preparing the payroll, and took to locking his office, which made Jansen's job duties of delivering his mail and messages considerably more difficult. Although he restored the payroll duties when Jansen complained to Migala, Antoni delayed Jansen's performance review and her raise. Antoni also allegedly engaged in some "self-help" retaliation, slashing the tires of Jansen's car and wrapping her car antenna around her rearview mirror. Jansen ultimately filed a complaint with the EEOC claiming sexual harassment on February 26, 1993. In November 1993, the EEOC issued her right to sue letter, and she filed this suit on January 26, 1994, claiming sexual harassment and retaliation in violation of Title VII and raising several state law claims. Following discovery, the district court granted PCA's motion for summary judgment on all counts.

B. *Ellerth v. Burlington Industries*

Kimberly Ellerth first interviewed for a marketing job at Burlington Industries in March 1993. After her initial interview with Mary Strenk Fitzgerald, a National Accounts Manager in the Mattress Ticking Division, she was invited back to interview with Theodore Slowik, the Vice President of Sales and Marketing for that division. Ellerth found her meeting with Slowik disturbing because he asked her highly personal questions such as whether she and her husband were planning on having a family and "practicing" at it, and he stared conspicuously at her breasts and legs. About a week after the Slowik interview, Burlington offered Ellerth a job in which she would report to Fitzgerald, who in turn reported to Slowik. Ellerth accepted the position and joined Fitzgerald as the only other employee in the Chicago office.

Given the management structure, Ellerth was required to see and communicate with Slowik on a regular basis. On average, she saw him one or two days every month or two, either in Chicago, in New York, or at other corporate locations. She spoke with him on the telephone approximately once a week. These encounters, both verbal and direct, were characterized by a constant barrage of sexual comments, innuendo, and occasionally more explicit threats. Before one of Ellerth's trips to New York in the summer of 1993, Slowik telephoned her and spoke suggestively to her. Once she got to New York, at least two offensive incidents occurred. First, Slowik told Ellerth a number of off-color, offensive "jokes" during a meeting in his office. Second, at a business lunch with Ellerth and Angelo Brenna, Burlington's Vice President of International Sales, Slowik told a number of sexually offensive "jokes" and rubbed Ellerth's knee under the table. She pulled her leg away when he touched it. As the three left the restaurant, Slowik walked several feet behind Ellerth with Brenna, commented "You have got great legs, Kim," and

then asked Brenna what he thought. Ellerth complained about Slowik's behavior to two other Burlington employees as soon as she returned to the office.

Slowik continued making sexually offensive comments to Ellerth, both about her and about other women. These encounters were all in conjunction with business meetings. After one business dinner in Greensboro, North Carolina, Burlington's corporate headquarters, Slowik invited Ellerth to join him at the lounge of the hotel where they were both staying and she felt obliged to accept. While there, Slowik commented that the female band members had nice breasts, nice legs, and nice, skimpy outfits. Looking at Ellerth's breasts, he then said, "You are a little lacking in that area, aren't you, Kim?" When she did not respond, Slowik told her that she "ought to loosen up," and then, more threateningly, he said, "You know, Kim, I could make your job very hard or very easy at Burlington." Ellerth understood this to mean that she would have to have sex with Slowik to succeed at the company.

After the Greensboro trip, Slowik's telephone calls increased in number. Although they were brief, they normally included sexually harassing comments. Slowik would talk about Ellerth's body (particularly her legs) and would ask about her "practice" to have a family. On several occasions, Slowik refused to give her special permission to do things for customers until she described her clothing to him. He directly stated that her job would be much easier if she wore shorter skirts. On another occasion, he made comments in front of another employee that implied that Ellerth had been performing fellatio on him.

In addition to the harassing comments, Slowik repeated his unwanted touching of Ellerth on at least two occasions. He patted her rear at the annual company holiday party, and rubbed her knee during an interview for a promotion to the

position of Sales Representative for the Midwest territory while asking her whether the frequent travel associated with the new position would make her husband miss her. After the interview, the previous Midwest sales representative told Ellerth that Slowik (who had final decisionmaking responsibility for the promotion) was reluctant to promote her because she was "arrogant." Patrick Lawrence, who was also involved in the interviews and also reported to Slowik, confirmed that comment. When Ellerth confronted Slowik with this information, he admitted calling her arrogant and told her he was hesitant to promote her. Ellerth asked, "[I]s it because I'm not loose enough for you, Ted?," and Slowik replied in the affirmative. Nevertheless, two weeks later Slowik called to tell Ellerth that she had received the promotion, although he could not resist adding a sexually inappropriate comment at the end of the conversation that reduced Ellerth to tears.

Burlington's employee handbook included a brief statement that "[t]he company will not tolerate any form of sexual harassment in the workplace. . . . If you have any questions or problems, or if you feel you have been discriminated against, you are encouraged to talk to your supervisor or human resources representative or use the grievance procedure promptly." In the next paragraph of the "Employee Relations" section, Burlington's handbook maintained that it had an "Open Door Policy":

> Burlington's Open Door Policy means just what it says—management's door is always open to you whenever you have ideas, suggestions or concerns about work-related matters. Most often, you will want to speak with your supervisor first. But if you feel more comfortable talking with your human resources manager or department manager, please don't hesitate to do so.

> They will do their best to answer your questions or help solve a problem.

Defendant's Appendix, Exh. F at 3. Although Ellerth did not talk either to Lawrence or the human resources manager, she did make her complaints known in several ways. First, of course, she had complained directly to Slowik himself, who certainly stood in a supervisory relationship to her. Second, in early 1994, she complained to Donna Thibideau, Burlington's Customer Service Manager, that Slowik was sexually harassing her. Thibideau told her that Slowik also may have harassed another Burlington employee. Finally, Ellerth complained to several other Burlington employees, including Sherry Hester, a Customer Service Representative, and Brett Schneider, a Sales Representative.

In May 1994, Ellerth and her new supervisor, Lawrence, met to discuss ways in which they could improve office procedures. At that time, Lawrence made no mention of customer complaints about Ellerth's own performance. Shortly thereafter, Lawrence and Thibideau received two such complaints, which prompted a May 22, 1994, memorandum from Lawrence cautioning Ellerth to be more careful about returning telephone calls. On May 31, 1994, Ellerth left a message on Lawrence's answering machine telling him that she was quitting. She faxed him a letter to the same effect. Three weeks later, she sent Lawrence a detailed explanation of her reasons for quitting, which informed him directly for the first time about Slowik's harassing behavior, including the unwanted touching and lecherous looks. She explained that both she and her husband had feared that her job would be jeopardized if she had complained any more about Slowik's actions than she had done. On October 12, 1994, Ellerth filed charges of sexual harassment with the Illinois Department of Human Resources (IDHR) and the Equal Employment Opportunity Commission

(EEOC). This suit followed after the EEOC sent its right to sue letter on November 30, 1994. As in Jansen's case, after some time for discovery the district court granted Burlington's motion for summary judgment on all counts.

C. *Pleading Issues*

Both PCA and Burlington raised an initial procedural objection to the plaintiff's ability to proceed on their "*quid pro quo*" theories at all. In Jansen's case, PCA claims that Jansen did not mention the factual basis for her "*quid pro quo*" claim in her EEOC complaint and thus that she should not be able to raise the claim now; it also argues that allegations about her "*quid pro quo*" claim were "utterly absent" from her complaint. Burlington similarly argues that Ellerth's Title VII complaint did not adequately give it notice that she was claiming "*quid pro quo*" harassment as well as "hostile environment" harassment. Neither PCA's nor Burlington's claims has merit even if we accept the distinction between "*quid pro quo*" and "hostile environment" harassment. Jansen's EEOC charge made it clear that she was complaining about harassment, and it was supported by her affidavit, which gave several specific examples of the harassing conduct. This suffices to show the kind of factual relationship between the conduct described in the EEOC charge and that raised in the lawsuit that our cases have required. See, *e.g.*, *Cheek v. Western and Southern Life Insurance Co.*, 31 F.3d 497, 500 (7th Cir.1994). Jansen's complaint also alleged facts sufficient to state a claim encompassing "*quid pro quo*" harassment under the liberal pleading standards of Fed.R.Civ.P. 8(a). See *Vidimos, Inc. v. Laser Lab Ltd.*, 99 F.3d 217, 222 (7th Cir.1996); *Bartholet v. Reushauer A.G.*, 953 F.2d 1073, 1078 (7th Cir.1992). Ellerth's EEOC charge and her Title VII complaint were similar. In the charge, she asserted that Slowik had sexually harassed her and that she had been "compelled to resign . . .

due to [the continued] hostile offensive and abusive work environment created by SLOWIK's harassment and my opposition to sexual harassment by SLOWIK." Her district court complaint alleged that she was "inappropriately touched and sexually harassed in her place of employment," and her brief in opposition to summary judgment argued that the harassment could be considered as the "*quid pro quo*" variety. Under my view, of course, both women's EEOC charges and complaints easily satisfy the burden of pleading that sex discrimination in the form of harassment occurred.

III

Under the standards outlined earlier in this opinion, both Jansen and Ellerth showed enough to survive summary judgment. Jansen's performance evaluation was held up for a significant period of time while her supervisor, Antoni (acting within the scope of his authority) both threatened her with an adverse job action if she did not have sex with him and imposed the immediate detriment of the delay when she refused to acquiesce. The threat was clearly enough to qualify as an adverse job action. The view espoused by a number of my colleagues that threats should never be enough to support liability, as a matter of law, would read out of the law all "*quid pro quo*" claims in which the victim acquiesces—a rule that would directly conflict with the Supreme Court's *Meritor*. See *Meritor*, 477 U.S. at 68. Furthermore, Jansen raised direct evidence of discrimination, see *Troupe v. May Dept. Stores Co.*, 20 F.3d 734, 736 (7th Cir.1994). The mere fact that a jury might choose to believe PCA's alternative explanation for the delay—that it was just a consequence of bureaucratic inertia—is of no importance on summary judgment, where we must draw inferences in Jansen's favor. From Jansen's perspective, the delay acted as a continuing demand for sexual favors, which caused its own injury, and it appears to have deprived her of at least the interest she would

have earned on a timely raise. See *In the Matter of Milwaukee Cheese Wisconsin, Inc.*, 112 F.3d 845, 849 (7th Cir.1997) ("[c]ompensation deferred is compensation reduced by the time value of money").[8]

Jansen also showed that Antoni harassed her in numerous other ways that fell within the scope of his authority. He was going about his business for PCA, taking advantage of his supervisory powers, while he badgered her, offensively pestering her for "blow jobs" and the like, and manipulating her work assignments based on her reactions to him. The one action he took that was clearly unrelated to his supervisory position was his alleged vandalism of her car. No authority that PCA gave him enabled him, helped him, or affected his ability to take knife to tire; Jansen's remedy here lies in the tort law of Illinois, not Title VII. For the record, although it is unnecessary for me to reach the point, I agree with those who believe that Jansen's complaints to the company, combined with its previous experience with Antoni, were enough to preserve her rights under a negligence theory.

Ellerth also brought forward enough to defeat summary judgment. Her evidence indicates that Slowik, acting within the scope of his authority (and, as some would put it, using his delegated authority), refused to give her special permission for work projects until she described her physical appearance to him. Interpreted in light of his earlier comment that he "could make [her] job very hard or very easy at Burlington," a jury could find that she had to play the role of sex object in order to obtain desirable work assignments (and

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[8] At this early stage of the litigation, it is immaterial that Jansen has not quantified the monetary damages she suffered; it is enough that she has shown the delay in receiving her raise and she has tied it to Antoni's harassing behavior. There is no rule in Title VII that a claim in which damages are small or nominal must be dismissed.

thus to advance in the company). The numerous incidents in which Slowik withheld permission for assignments until Ellerth satisfied his demands could, if believed by a factfinder, support a finding that harassment occurred.

Ellerth showed that Slowik, acting within the scope of his employment, poisoned the environment for her in other ways as well. As the district court conceded, the constant sexually suggestive remarks, the criticism of the size of her breasts, the importunements to be "looser," and the unwanted and uninvited touchings would have been enough to make work onerous for any woman. This court would look foolish indeed to the public at large if we appeared unable to distinguish between three friendly pats on the back and three acts of sexually oriented stroking. If a supervisor cannot tell the difference, he needs remedial counseling, not a free pass. No one wants to be a wet blanket on office romances, but the simple rule, reflected in every creditable sexual harassment policy in the country, is that unwanted touching is *verboten*. Would-be suitors in the office must just wait until their interest is reciprocated. Slowik knew that Ellerth did not welcome his advances, because she told him so. Obviously, there are two sides to this story, and the jury may not believe Ellerth in the end. But she is entitled on the facts she has shown thus far to try to persuade them that hers is the more credible account.

My conclusion that Slowik acted within the scope of his authority and abused his supervisory authority makes it unnecessary for me to reach the negligence issue. Those who are attempting to pigeonhole harassment cases have decided unfortunately that Ellerth waived this point by her statement disclaiming reliance on Restatement § 219(2)(b). I disagree. It is ironic that those who criticize undue reliance on the Restatement have seized on Ellerth's passing reference to its language as a way of finding that she waived the right to

support her hostile environment allegations on a negligence theory; one can reject the Restatement and still turn to the Title VII rules on negligence. Indeed, her brief stressed the point that she notified a number of individuals at Burlington about Slowik's harassing behavior, which would be relevant only if she thought Burlington's knowledge might be relevant under an alternative theory of liability. If negligence were the standard for her "hostile environment" claim, I would find that Ellerth is entitled to reach a jury on this theory. Even if a company has a policy against sexual harassment, as Burlington did (though a skimpy one as these things go), it cannot put on blinders and pretend that corporate "knowledge" comes only through that channel. I do not understand the other members of this court to argue otherwise; a plaintiff is entitled to prove that the employer "knew or should have known" about the offensive conduct in any way that she can. Use of a policy is a particularly easy way to satisfy this burden, but it is not the only one. Ellerth complained to a number of Burlington employees about Slowik, including most notably Donna Thibideau, Burlington's Customer Service Manager. Thibideau thought this may not have been the first time Slowik had behaved inappropriately. Ellerth is entitled to the opportunity to prove at trial that her informal communications were sufficient to put the company on notice of the problem.

For the reasons stated above, I would REVERSE the order of summary judgment and REMAND both No. 95-3128, *Jansen v. Packaging Corp.*, and No. 96- 1361, *Ellerth v. Burlington Industries*, for further proceedings.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Sixth Circuit

APPENDIX B

United States Court of Appeals
Seventh Circuit

No. 96-1361

KIMBERLY B. ELLERTH,

Plaintiff-Appellant,

v.

BURLINGTON INDUSTRIES, INC.,

Defendant-Appellee.

Argued Sept. 9, 1996.
Decided Nov. 27, 1996*

Rehearing and Rehearing En Banc Granted, and Decision Vacated Jan. 28, 1997**

Before BAUER, ROVNER, and DIANE P. WOOD, Circuit Judges. DIANE P. WOOD, Circuit Judge

Former employee sued her former employer for sex discrimination and constructive discharge under Title VII. The United States District Court for the Northern District of Illinois, Ruben Castillo, J., 912 F.Supp. 1101, entered

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* This opinion was originally released in typescript format.

** The Honorable Kenneth F. Ripple did not participate in the consideration of the suggestion for rehearing en banc.

summary judgment for former employer on ground that it was not responsible for supervisor's actions. Former employee appealed. The Court of Appeals, Diane P. Wood, Circuit Judge, held that: (1) complaint invoked *quid pro quo* theory of sexual harassment, and employee was thus entitled to have her allegations tested under that approach; (2) fact issues existed as to whether supervisor engaged in *quid pro quo* sexual harassment; (3) summary judgment evidence was sufficient to support finding that supervisor was acting within scope of employment when he allegedly sexually harassed employee; and (4) existence of policy forbidding sexual harassment did not alter any liability of employer under Restatement (Second) of Agency section providing for liability where servant purported to act on behalf of principal and there was reliance upon apparent authority, or servant was aided in accomplishing tort by existence of agency relation.

Reversed and remanded.

Kimberly Ellerth's lawsuit against Burlington Industries, which claimed that a higher level supervisor sexually harassed her, foundered on the rules for holding a company liable for its supervisory employees' conduct in this area. Expressing some frustration with the inadequacy of the theoretical framework available, the district court concluded that Burlington was not liable under any of the theories of agency law that Ellerth proffered. We agree with the district court that the rules governing supervisory liability in both *quid pro quo* and hostile work environment sexual harassment cases have been less than clear. Applying the agency principles that the Supreme Court instructed us to use in *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986), we conclude that Ellerth presented enough facts to survive summary judgment.

I

In March 1993, Ellerth interviewed for a marketing job at Burlington with Mary Strenk Fitzgerald, a National Accounts Manager in the Mattress Ticking Division. This conversation went well, and Ellerth was invited back for a second interview with Theodore Slowik, the Vice President of Sales and Marketing for the Mattress Ticking Division. From Ellerth's perspective, which we take on this appeal from an adverse grant of summary judgment, the initial encounter with Slowik was disturbing. Among other questions, he asked her if she and her husband were planning on having a family and "practicing" at it, and he stared conspicuously at her breasts and legs. About a week after this interview, Burlington offered and Ellerth accepted the position of Merchandising Assistant in its Chicago office. She reported to Fitzgerald, who in turn reported to Slowik. Fitzgerald and Ellerth were the only two employees in the Chicago office.

Given the management structure, Ellerth saw (and was required to see) Slowik on a regular basis. Although Slowik was based in New York, he came to the Chicago office one or two days every month or two. Occasionally Ellerth saw him in Greensboro, North Carolina, at Burlington's corporate office and manufacturing headquarters, or on training trips to New York and San Francisco. Even when she did not see him in person, her job caused her to speak with him on the telephone about once a week.

Ellerth's encounters with Slowik, both verbal and direct, were characterized by a constant barrage of sexual comments, innuendo, and occasionally more. In the summer of 1993, for example, she traveled to New York for a week of training. Before that trip, Slowik had telephoned Ellerth and spoken

suggestively to her. While there, she had several conversations with him, two of which were prolonged. The first of those took place in Slowik's office, during which he told Ellerth a number of off-color, offensive jokes. The second took place over a business lunch that included Ellerth, Slowik, and Angelo Brenna, Burlington's Vice President of International Sales. Slowik again told a number of sexually offensive jokes and rubbed Ellerth's knee under the table. She pulled her leg away when he touched it. When the three left the restaurant, Slowik and the other Vice President walked several feet behind Ellerth, and Slowik commented, "You have got great legs, Kim" and then, to Brenna, "What do you think, Angelo?" When they returned to the office, Ellerth reported to two other Burlington workers that Slowik and Brenna had been loud, obnoxious, rude, and offensive at the lunch.

Slowik continued making sexually offensive comments when Ellerth was with him, both about her and about other women. After a business dinner in Greensboro, Slowik invited Ellerth to join him at the lounge of the hotel where they were both staying, and she felt obliged to accept. At the lounge, Slowik commented that the female band members had nice breasts, nice legs, and nice, skimpy outfits. Looking at Ellerth's breasts, he then said, "You are a little lacking in that area, aren't you Kim?" When she did not respond, Slowik told her that she "ought to loosen up," and stared at her chest and legs. Upon leaving the lounge, Slowik's remark was more threatening: "You know, Kim, I could make your job very hard or very easy at Burlington." Ellerth interpreted this to mean that she would have to have sex with Slowik to succeed at the company.

After the Greensboro trip, Slowik began telephoning Ellerth more frequently. The calls, though brief, normally

included sexually harassing comments. Slowik would talk about her body (particularly her legs) and would ask about her "practice" to have a family. On several occasions, he refused to give Ellerth special permission to do something for a customer until she described her clothing to him. He suggested that her job would be much easier if she wore shorter skirts. Ellerth testified that "every time I was on the phone with him I ended up most—in tears." The same kind of conduct continued when he saw her personally. In the fall of 1993, on a visit to the Chicago office, Slowik encountered Ellerth on the floor where she was folding samples. In front of another employee, he said, "on your knees again, Kim," implying (falsely) that she would "again" perform fellatio.

Ellerth's resistance to Slowik's overtures did not deter him. In February and March 1994, Ellerth interviewed with Patrick Lawrence (who also reported to Slowik) and Slowik for a promotion to the position of Sales Representative for the Midwest territory. Slowik, who had final decisionmaking responsibility for the promotion, rubbed her knee with his hand during the interview for the promotion while asking her whether the frequent travel associated with the new position would make her husband miss her. Patrick Crosson, the person who had held that position previously, told Ellerth before her interview that Slowik had said he did not want to promote her because she was "arrogant." Lawrence reported the same thing. When Ellerth confronted Slowik about this, he admitted calling her arrogant and said, "I have my hesitations having you in this position." Ellerth asked, "[I]s it because I'm not loose enough for you, Ted?", and Slowik replied in the affirmative. Some two weeks later, Slowik called Ellerth to tell her she had received the promotion, but he added a sexually inappropriate comment to her at the end of the conversation that made her start crying.

In addition to Ellerth's complain[t]s about Slowik to the workers in the New York office, a[nd] to Vice President Brenna's direct observation of Slowik's behavior, Ellerth also complained in early 1994 to Donna T[hi]bideau, Burlington's Customer Service Manager, that S[lo]wik was sexually harassing her. Thibideau (who held a higher level position than Ellerth) told her that Slowik al[so] may have harassed Ann Pillow, another Burlington em[plo]yee. Ellerth also complained to Sherry Hester, a Customer Service Representative, to Brett Schneider, a Sales Representative, and to several customers. On at least one occasion between her hire date and the fall of 1993 she complained directly to Slowik about his behavior.

In May 1994, Ellerth and her new supervisor, Lawrence, met to discuss ways in which they could improve office procedures. Lawrence accepted some of Ellerth's suggestions; he made no mention of ar[y] customer complaints about her performance, including about her returning telephone calls. Shortly thereafter, L[a]wrence and Thibideau received one or two such complaints, [w]hich prompted a letter on May 22, 1994, from Lawrence to E[l]lerth about her failure to return calls from two customers and three Burlington employees. The letter referred t[o] a May 18, 1994, conversation between Lawrence and Ellerth, which Ellerth contends did not take place.

On May 31, 1994, Ellerth left a m[e]ssage on Lawrence's answering machine telling him that sh[e] was quitting, and she faxed him a letter to the same effect. The original letter that she wrote included references to Slow[i]k's harassment of her: "What I did not want to mention to yo[u] was the fact that Ted had harassed me in the past and I simp[l]y ignored him to save my job;" "[n]eedless to say these inc[i]dents could be seen as sexual harassment;" and "[w]hat a sh[a]me that one man can

have such an influence." At the advice of her husband, and knowing that Slowik was Lawrence's supervisor, she covered up those sentences with correction fluid before sending the fax, which she transmitted in a form that showed the blank spaces from the redaction. Three weeks later, she sent Lawrence a more complete explanation, in a letter dated June 21 that said in part:

> Before I was hired, you and I spoke about the reasons why Ted didn't feel comfortable around me. I told you he had said and done some sexually inappropriate things to me in the past. What I didn't tell you was that he had on two occasions, patted my rear and every time he saw me looked me up and down like a piece of meat. . ..

Although Ellerth knew that Burlington had a policy against sexual harassment, she was unaware of how vigorously it was enforced, and both she and her husband feared that her job would be jeopardized if she complained more than she already had.

Burlington's policy against sexual harassment was in force throughout the time Ellerth was employed there. It stated that "[t]he company will not tolerate any form of sexual harassment in the workplace. . .. If you have any questions or problems, or if you feel you have been discriminated against, you are encouraged to talk to your supervisor or human resources representative or use the grievance procedure promptly." It is undisputed that Ellerth did not use the grievance procedure or complain to her direct supervisor (as opposed to Slowik himself).

II

On October 12, 1994, Ellerth filed a charge of sexual harassment with the Illinois Department of Human Rights (IDHR) and with the Equal Employment Opportunity Commission (EEOC). Her complaint alleged that:

> On numerous occasions, since in or about March 1993, I was sexually harassed by . . . TED SLOWIK. On several occasions, including on or about March 15, 1994, SLOWIK rubbed my knee in an offensive and unwelcome manner. SLOWIK also made numerous comments to me about my legs, breasts and physical appearance, including on or about May 1, 1994, when he told me I had great legs and should wear shorter skirts. SLOWIK also made a comment to me, on or about October 1, 1993, about me being on my knees "again."

She alleged as the latest date of discrimination May 30, 1994, which was when she felt "compelled to resign . . . due to continued the [sic] hostile offensive and abusive work environment created by SLOWIK's sexual harassment and my opposition to sexual harassment by SLOWIK." The EEOC issued a right to sue letter on November 30, 1994, and this suit followed.

Ellerth's complaint in the district court alleged both sex discrimination (in the form of sexual harassment) in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., and constructive discharge in violation of Title VII. See *Ellerth v. Burlington Indus.*, 912 F.Supp. 1101 (N.D.Ill.1996). Although the district court's opinion analyzed the case as one involving the "hostile work environment" variety of sexual harassment, the court noted that "imbedded

in Slowik's harassment of Ellerth is a *quid pro quo* proposition," referring to Slowik's threat "I could make life very hard for you." *Id.* at 1114. Nonetheless, the court thought the complaint's failure explicitly to allege the *quid pro quo* theory prevented it from using that theory as a ground of recovery. *Id.* at 1114-15 n. 10.

Burlington argued before the district court that Ellerth's complaint was untimely as to all conduct occurring before December 20, 1993, the date 300 days before she filed her complaints with the IDHR and the EEOC. Finding that Ellerth was aware of the discriminatory nature of Slowik's conduct from the outset, the district court agreed that "by the summer of 1993, Slowik's discriminatory conduct had the degree of permanence that should have triggered Ellerth's awareness of and duty to assert her rights." *Id.* at 1113. Nonetheless, the court found that evidence of pre-December 10, 1993, conduct was relevant to the consideration whether Ellerth was subjected to an actionable hostile work environment. In that light, it found that Ellerth had raised a genuine issue of material fact on the hostile work environment issue. The court specifically found that Slowik's March 1994 conduct, rubbing Ellerth's knee during the promotional interview, "could be regarded as reinforcing Slowik's previous persistent implicit messages to her that her value was as a sex object and that her growth in the company was dependent upon her sexual availability to him." *Id.* at 1114.

The critical issue in the case therefore became whether Burlington was liable for Slowik's conduct. The district court noted that *Meritor* requires courts to look to agency principles when evaluating whether employers should be held liable for sexual harassment by their supervisors. It first considered whether Slowik's harassment was committed

within the scope of his employment, as that term is used in the Restatement (2d) of Agency § 219(1) (1958). Looking at the factors listed in the Restatement (2d) § 228(1)(c) and at § 235, the court concluded that Slowik's conduct was not motivated to serve Burlington and thus that it could not be considered as falling within the scope of his employment. The court then turned to § 219(2), which sets forth various theories under which an employer might be liable for acts of its employees acting *outside* the scope of their employment. It found that Ellerth could not use § 219(2)(b), which applies where the employer was negligent or reckless, because her failure to use Burlington's sexual harassment remedies or to take other measures to notify Burlington meant that she could not show that Burlington knew or should have known about Slowik's conduct. The court held that Slowik's position as manager did not mean that his acts could automatically be imputed to Burlington. Finally, the court rejected liability under § 219(2)(d) of the Restatement, which subjects an employer to liability when the employee exercises apparent authority or is aided in accomplishing the tort by means of the agency relation. This language, it thought, reaches only conduct that on its face appears to be a natural and authorized incident of the agency. Here, Ellerth was aware that Slowik was exceeding his authority. Recharacterizing the case as a *quid pro quo* action or as constructive discharge was also unavailing for Ellerth. The district court therefore granted summary judgment for Burlington and dismissed all of Ellerth's claims.

III

Before this Court, Ellerth raises two principal claims: first, she asserts that her complaint (both before the EEOC and in the district court) was sufficiently broad to encompass the *quid pro quo* theory, and second, she argues that the

district court erred as a matter of law in its analysis of the agency principles applicable to her case. We address the procedural question first, and then consider the issue of supervisory liability under both theories of harassment.

A.

The district court construed Ellerth's complaint as one invoking only the hostile work environment theory of sexual harassment, although its opinion acknowledges that her allegations brought to mind *quid pro quo* harassment as well. On appeal, Burlington urges us to take the same approach. It portrays her *quid pro quo* theory as an afterthought, developed only in the course of discovery and not stressed until her briefs before this Court. Ellerth, for her part, argues that her complaint met the liberal standards of Fed.R.Civ.P. 8(a)(2) and that particularized pleading of sub-theories of sexual harassment (itself a subset of the sex discrimination prohibited by Title VII) is not required by the rule.

In our view, Ellerth has the better of this argument. Her charge with the EEOC alleged that Slowik had sexually harassed her and concluded with the complaint that she had been "compelled to resign . . . due to [the continued] hostile offensive and abusive work environment created by SLOWIK's harassment *and my opposition to sexual harassment by* SLOWIK." (Emphasis added.) Her complaint in the district court alleged simply that she was "inappropriately touched and sexually harassed in her place of employment." The distinction between hostile environment and *quid pro quo* sexual harassment is an analytical one, rather than one based on statutory language. Indeed, it would be a mistake to think that there is a bright line between the two kinds of situations, as Ellerth's own case illustrates. The same actions that create a hostile environment may have

overtones of *quid pro quo* demands, and a person suffering from *quid pro quo* harassment is also enduring a hostile environment. Whatever utility the distinction may have in the factual and legal development of a case, there is no requirement that EEOC charges or Title VII complaints plead the particular theory of harassment that the complainant wishes to pursue. See *Vidimos, Inc. v. Laser Lab Ltd.*, 99 F.3d 217, 222 (7th Cir.1996); *Bartholet v. Reishauer A.G.*, 953 F.2d 1073, 1078 (7th Cir.1992). Ellerth's complaints, coupled with the supporting materials she submitted to the district court, brought forward the facts tending to show *quid pro quo* as well as hostile environment harassment, and the court's extensive discussion of the *quid pro quo* theory shows that it recognized its potential applicability. Ellerth was entitled to have her allegations tested under both approaches, both in the district court and here, on our *de novo* review of the district court's summary judgment ruling.

B.

As this Court recently noted in *Bryson v. Chicago State University*, 96 F.3d 912 (7th Cir.1996), *quid pro quo* harassment "occurs in situations where submission to sexual demands is made a condition of tangible employment benefits." *Id.* at 915. See also *Bristow v. Drake St. Inc.*, 41 F.3d 345, 353-54 (7th Cir.1994); *Dockter v. Rudolf Wolff Futures, Inc.*, 913 F.2d 456, 461 (7th Cir.1990); *King v. Board of Regents of the Univ. of Wis. Sys.*, 898 F.2d 533, 539 (7th Cir.1990); *Saxton v. American Tel. and Tel. Co.*, 785 F.Supp. 760, 764 (N.D.Ill.1992), aff'd, 10 F.3d 526 (7th Cir.1993). The initial question for us is therefore whether Ellerth's allegations and the materials she presented in opposition to Burlington's motion for summary judgment raised a genuine issue of fact on her *quid pro quo* theory. We conclude that they did. On a number of occasions, this

evidence indicates that Slowik refused to give Ellerth special permission for work projects until she described her physical appearance to him. Interpreted in the light of his earlier comment that he "could make [her] job very hard or very easy at Burlington," a jury could find that she had to play the role of sex object in order to obtain desirable work assignments. The numerous incidents in which Slowik withheld permission for work assignments until she satisfied his demands could, if believed by a factfinder, support a finding that the harassment occurred. In addition, the district court found, and we agree, that Ellerth came forward with enough evidence to support a factual finding of hostile work environment.

C.

We therefore turn to the question which is central to both the *quid pro quo* claims and the hostile environment claims: whether Burlington is liable for Slowik's actions under the rules for employer liability established in *Meritor* and *Harris v. Forklift Sys. Inc.*, 510 U.S. 17, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993). In 1986, the Supreme Court confirmed in *Meritor* that sexual harassment is a form of sex discrimination prohibited by Title VII. After holding that actionable harassment could exist if it were sufficiently severe or pervasive to alter the conditions of employment, the Court turned to the question of the employer's liability for its supervisor's actions. As in our case, the employer in *Meritor* had not been given notice of the supervisor's alleged conduct. After discussing the parties' respective positions on the question, the Court commented that the debate had "a rather abstract quality about it given the state of the record in this case." 477 U.S. at 72, 106 S.Ct. at 2408. Rather than issuing a definitive rule on employer liability, the Court instead stated only that it agreed with the EEOC:

> that Congress wanted courts to look to agency principles for guidance in this area. While such common-law principles may not be transferable in all their particulars to Title VII, Congress' decision to define "employer" to include any "agent" of an employer, 42 U.S.C. § 2000e(b), surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible. For this reason, we hold that the Court of Appeals erred in concluding that employers are always automatically liable for sexual harassment by their supervisors. See generally Restatement (Second) of Agency §§ 219-237 (1958). For the same reason, *absence of notice* to an employer does *not necessarily insulate* that employer from liability.

Id. (Emphasis added.) Importantly, the Court rejected the employer's argument that "the mere existence of a grievance procedure and a policy against discrimination, coupled with [the employee's] failure to invoke that procedure," insulated it from liability. *Id.* It concluded that the Court of Appeals had been wrong "to entirely disregard agency principles and impose *absolute* liability on employers for the acts of their supervisors, regardless of the circumstances of a particular case." *Id.* at 73, 106 S.Ct. at 2408 (emphasis added).

Meritor thus rejected both the extreme view that employers are "automatically" or "absolutely" liable for the actions of their supervisory personnel, and the extreme view that the mere existence of a grievance procedure and a policy against discrimination is enough to insulate the employer from liability. Notably, the Court phrased its discussion in terms of what Title VII required, implying that it was not creating a rule specific to sexual harassment cases but instead was construing the statute as a whole to require reference to

agency principles. We must decide, therefore, whether Ellerth presented enough to defeat summary judgment for Burlington on the ground that agency principles themselves show that it is not liable for Slowik's actions. This is the first occasion since *Meritor* that this court has been required to consider the problem of sexual harassment by supervisors in this light. We begin, as *Meritor* instructs, by consulting basic agency law.

D.

The Restatement (2d) of Agency, § 219 ("Second Restatement"), sets forth the general rules for when a master is liable for the torts of his servants. The rules of agency apply with equal force when the relationship is one of master and servant, because a servant is merely "an agent of a special kind, over whose physical acts the principal has control or the right to control." *Id.* § 25, cmt. a. Because it is critical to our analysis, it is worth setting forth the language of § 219 in full:

> (1) A master is subject to liability for the torts of his servants committed while acting in the scope of their employment.
>
> (2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:
>
> (a) the master intended the conduct or the consequences, or
>
> (b) the master was negligent or reckless, or
>
> (c) the conduct violated a non-delegable duty of the master, or
>
> (d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or

he was aided in accomplishing the tort by the existence of the agency relation.

The parties have focused most of their arguments on § 219(2)(d), to which we turn in time, but like the district court we begin with § 219(1), which holds the key to supervisory liability in many of these cases.

The critical question here, as in most agency cases, is the meaning of the phrase "acting in the scope of their employment." Few concepts have a longer history in the law of agency. Thus, for example, Justice Joseph Story wrote in his Commentaries on the Law of Agency (5th ed. 1857) ("Story on Agency") that a principal:

> is held liable to third persons in a civil suit for the frauds, deceits, concealments, misrepresentations, torts, negligences, and other malfeasances, or misfeasances, and omissions of duty, of his agent, in the course of his employment, although the principal did not authorize, or justify, or participate in, or, indeed, know of such misconduct, or even if he forbade the acts, or disapproved of them.

Story on Agency, § 452, at 536-37. In these cases, Story explained, "the principal holds out his agent, as competent, and fit to be trusted; and thereby, in effect, he warrants his fidelity and good conduct in all matters within the scope of the agency." *Id.* at 537. For matters outside the scope of the agency, Story wrote that the principal would not be liable unless he had expressly authorized the acts to be done, or he subsequently adopted them for his own use or benefit. *Id.* § 456, at 587. See also Floyd R. Mechem, The Law of Agency § 732, at 562 (1889) ("the agent's act is the act of the principal, and whatever injuries may result to third persons,

from the manner in which the act is performed, are properly attributable to the principal").

The English treatise on The Law of Master and Servant by Francis Raleigh Batt (J. Crossley Vaines ed. 1950) ("Batt on Master and Servant") throws some light on the traditional way of determining exactly what falls within the scope of employment. Batt wrote that "[a] master is liable for the wrongful act of his servant when it arises out of the performance of the servant's duties of service or when it is effected by the servant exercising the authority by which the contract of service endows him." *Id.* at 254. This excludes cases where the servant is engaged on business of his own and the wrongful act was unconnected with the master or his affairs. John W. Salmond's Treatise on the Law of Torts (1907) ("Salmond on Torts") is similar, stating that an act is done in the course of employment if it is either "(a) a wrongful act authorised by the master, or (b) a wrongful and unauthorised mode of doing some act authorized by the master." *Id.* § 29, at 83. Quoting from the Court of Exchequer Chamber in *Barwick v. English Joint Stock Bank*, (1867) L.R. 2 Ex. 259 at 266, Salmond noted that "[i]n all these cases . . . it may be said that the master has not authorized the act. It is true he has not authorized the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of his master to place him in." Salmond on Torts at 84. Early Supreme Court cases reflect the same principles. See *Philadelphia and Reading R.R. Co. v. Derby*, 55 U.S. 468, 14 How. 468, 14 L.Ed. 502 (1852) (railroad company liable for train accident although conductor acted contrary to express instruction of dispatcher) (citing Story on Agency § 452 and others); *New Orleans, M. & C. Railroad*

Co. v. Hanning, 15 Wall. 649, 82 U.S. 649, 657, 21 L.Ed. 220 (1872) (railroad company liable for injuries caused by agent's negligent rebuilding of wharf) (citing Story on Agency § 452); *Singer Mfg. Co. v. Rahn*, 132 U.S. 518, 522-23, 10 S.Ct. 175, 176-77, 33 L.Ed. 440 (1889) (sewing machine company liable for carriage accident caused by employee driving wagon furnished by company and under exclusive contract with company).

Both the First Restatement of Agency (1933) and the Second Restatement carry forward these principles. In general, according to the Second Restatement § 228, conduct of a servant is within the scope of employment if and only if (a) it is of the kind he is employed to perform, (b) it occurs substantially within the authorized time and space limits, (c) it is actuated, at least in part, by a purpose to serve the master, and (d) if force is intentionally used by the servant against another, the use of force is "not unexpectable" by the master. Section 229 sets forth no less than ten factors that are helpful in determining whether or not conduct, "although not authorized, is nevertheless so similar to or incidental to the conduct authorized as to be within the scope of employment." Second Restatement, § 229(2). Comment a explains that "[s]ince the phrase 'scope of employment,' is used for the purpose of determining the liability of the master for the conduct of servants, the ultimate question is whether or not it is just that the loss resulting from the servant's acts should be considered as one of the normal risks to be borne by the business in which the servant is employed."

Reflecting no material change from the 19th-century authorities, the Second Restatement endorses the rule that the mere fact that an employer has forbidden his servant to do something, or to accomplish a task in a particular way, is not enough to defeat a finding that the act was within the scope of

employment. See *id.* § 230. This rule holds even if the employer has specifically forbidden the employee to do the act in question. Criminal or tortious acts can be found to be within the scope of employment, as § 231 describes at some length. Conduct is not for the purpose of serving a master only if it is done with no intention to perform it either as a part of, or incident to, a service for which the servant is employed. § 235. If the servant's motives are mixed, his actions may still be within the scope of his employment. § 235, cmt. b; § 236. The specific examples in the text of torts of the servant for which the master may be liable, such as liability for physical harm caused by the negligent conduct of the servant acting within the scope of employment (sec. 243), the use of force if it is predictable (sec. 245), and defamation (sec. 246), all are based on this general principle.

In all of these cases, the court focuses on whether the employer had the right to control the servant's actions at the time of the tortious occurrence, not on whether it expressly authorized the tort itself. It is plain that a principal would not instruct or authorize an agent to perform tasks negligently, or fraudulently, or in a manner harmful to others, but a finding that conduct was negligent, fraudulent, or harmful does not defeat a conclusion that it was within the scope of employment.

General agency cases help to illustrate the appropriate level of specificity in evaluating the scope of employment question. See, *e.g.*, *Standard Oil v. Parkinson*, 152 F. 681 (8th Cir.1907) (oil company liable for death of railroad engineer caused by driver negligently crossing railroad with company's wagon, oil and gasoline); *Metzler v. Layton*, 373 Ill. 88, 25 N.E.2d 60 (1939) (accidental shooting of coworker during bank robbery was so connected with other acts within scope of bank manager's employment that whether he acted

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Colby, 375 Ill. 558, 31 N.E.2d 95
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v. United States, 398 F.2d 167 (2d C

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itself is a transaction within the ordinary course of the business of the [employer], or within the scope of the [employee's] authority, but whether *the service itself in which the tortious act was done* was within the ordinary course of such business or within the scope of such authority." *Id.* at 1351 (emphasis added; quotation marks omitted).

In *Martin*, the supervisor's assaults (which included rape, oral and anal sodomy, and forced fellatio) took place in the workplace, during working hours, on an employee whom he had authority to hire, fire, promote, and discipline. There was no question that the assaults were foreseeable; otherwise the company would not have had a policy about sexual harassment in the employee manual. The court concluded that under common law agency principles, the supervisor was acting within the scope of his employment, and the company was answerable for his acts. *Id.* at 1352. In addition, the court found that the supervisor had both actual and apparent authority over the employee, which he used to accomplish the wrongful acts in question. Citing this court's decision in *Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417, 1422 (7th Cir.1986), the Fourth Circuit found that Cavalier Hotel was liable for its manager's actions.

This court came to a similar result in *United States v. Balistrieri*, 981 F.2d 916 (7th Cir.1992), a case alleging that the owner of an apartment building and his rental agent had committed discriminatory rental practices in violation of the Fair Housing Act, 42 U.S.C. §§ 3601-19. The owner argued there that even if the evidence was enough to show that the rental agent had discriminated, there was nothing to link her discrimination to him. In language pertinent to the case before us, the court held:

> In any event, Hurdelbrink was acting as Balistrieri's agent. Her duties as agent were to show apartments and to do the other things—such as quoting rents and stating rental conditions—that go along with that job. Hurdelbrink was acting within the scope of her authority—either actual or apparent—when she committed her discriminatory acts. As we have previously held, in housing discrimination cases, "a principal is liable for the wrongful acts of its agent." *Hamilton v. Svatik*, 779 F.2d 383, 388 (7th Cir.1985); see also *Coates v. Bechtel*, 811 F.2d 1045, 1051 (7th Cir.1987). Therefore, Balistrieri is liable for Hurdelbrink's discrimination, even if he never expressly approved it.

981 F.2d at 930.

Applying these principles to the case before us, we conclude that the facts on the summary judgment record could support a finding that Slowik was acting within the scope of his employment with Burlington when he harassed Ellerth. As in *Martin*, most of his actions took place in the workplace, during working hours, and they were directed toward an employee over whom he had substantial authority. In some cases they occurred off-premises, but only in the context of business luncheons or work-related travel or—to quote *Martin*—"the service itself in which the tortious act was done was within the ordinary course of business or within the scope of such authority." 48 F.3d at 1351. Nothing ever happened on entirely personal time or circumstances. Slowik made the work environment hostile through the authority Burlington had given him to control Ellerth's work assignments and to influence (at the very least) her hiring and promotion, and his *quid pro quo* demands were (as they almost always will be) directly related to his corporate

position. The district court erred in believing that the relevant conduct was the harassment itself and that the harassment somehow needed to serve the employer's purpose before "scope of employment" liability could result. Construing the facts in the light most favorable to Ellerth, Slowik's supervision of Ellerth and the tasks she performed were plainly for Burlington's benefit; this is enough to make Burlington liable for his actions if he carried out those responsibilities in an improper manner.

Therefore, we arrive at much the same result as our sister circuits who have concluded that supervisory *quid pro quo* harassment can lead to employer liability, although our rationale differs in some important respects. See *Nichols v. Frank*, 42 F.3d 503, 513-14 (9th Cir.1994) (collecting cases); *Bouton v. BMW of North America, Inc.*, 29 F.3d 103, 106-07 (3d Cir.1994); *Karibian v. Columbia Univ.*, 14 F.3d 773, 777 (2d Cir.), *cert. denied*, 512 U.S. 1213, 114 S.Ct. 2693, 129 L.Ed.2d 824 (1994); *Kauffman v. Allied Signal, Inc.*, 970 F.2d 178, 185-86 (6th Cir.), *cert. denied*, 506 U.S. 1041, 113 S.Ct. 831, 121 L.Ed.2d 701 (1992); *Steele v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311, 1316 (11th Cir.1989). We believe, in any event, that the term "strict liability" is not well suited to discrimination cases. Strict liability, after all, refers to a tort rule designed to encourage people to exercise greater care when undertaking socially beneficial but abnormally hazardous activities. See W. Page Keeton *et al.*, Prosser and Keeton on the Law of Torts § 75 at 537 (5th ed. 1984 & Supp.1988). Running a corporation may create the potential that employees discriminate on forbidden grounds, but this activity is not "abnormally" hazardous in the sense that blasting, making munitions, and disposing of toxic waste are. Rather, the high incidence of employer liability in *quid pro quo* cases can be explained by the very nature of the

harassment. Consistently with *Meritor*, employers are not liable in *quid pro quo* cases because the standard is "strict." Liability follows instead because *quid pro quo* harassment describes a set of facts where the supervisor, as agent, will almost always be acting within the scope of his delegated authority, and the tangible employment benefit that is the "quid" lies within the supervisor's power to give or withhold only because the employer, as principal, entrusted the supervisor with that particular power. As the Supreme Court put it in *Meritor*, referring to the EEOC's position:

> where a supervisor exercises the authority actually delegated to him by his employer, by making or threatening to make decisions affecting the employment status of his subordinates, *such actions are properly imputed to the employer whose delegation of authority empowered the supervisor to undertake them.*

477 U.S. at 70, 106 S.Ct. at 2407 (citing to amici briefs of the Solicitor General and EEOC) (emphasis added).

Thus, if and to the extent that Slowik engaged in acts of sexual harassment of either the *quid pro quo* or hostile environment variety, within the period covered by Ellerth's complaint, Burlington itself may be liable under the principles outlined here. (We note that Ellerth did not appeal the district court's determination on the statute of limitations point.) The fact that Ellerth did not invoke the remedies provided by Burlington's sexual harassment policy is not dispositive, as the Court held in *Meritor*, 477 U.S. at 72, 106 S.Ct. at 2408. Under agency law, Burlington's liability for actions of its supervisor taken within the actual or apparent scope of his employment does not depend on whether someone else at the company knew or should have known

that Slowik was abusing the authority he had been given. The common law of agency places the responsibility on the employer to monitor the supervisory employees to whom it has entrusted special powers, to ensure that those powers are not misused.

E.

It is important to emphasize how the limiting principles found in the law of agency distinguish this outcome from the "automatic" or "absolute" theory of liability rejected by the *Meritor* Court. Because, on remand, some of those principles may also become relevant, we discuss them here. First and most important, the employer may succeed in showing that the supervisor's actions were taken outside the scope of his employment. (These might be actions taken entirely off the premises, where the meetings were not occasioned by the needs of the employer, or where the manner or type of abuse was entirely unforeseeable to the employer.) In that case, section 219(2) of the Second Restatement, set forth earlier, describes the much narrower circumstances under which a master may be liable for a servant's actions.

Subsection (a) of § 219(2) addresses the situation in which the master intended the conduct or consequences of the servant's actions. See Second Restatement § 212 (stating general rule that a person is subject to liability for the consequences of another's conduct which results from his directions if, with knowledge of the conditions, he intends the conduct or its consequences). In this circumstance, the question of "scope of employment" is basically beside the point, because the master has manifested a specific intent that the action occur.

Section 219(2)(b) makes the master liable for the servant's actions outside the scope of employment when the

master was negligent or reckless. See *id.* § 213. This theory frequently arises in sexual harassment cases, particularly where co-worker harassment is involved. For these cases, the question whether the employer knew or should have known about the harassing or other discriminatory conduct is central, because it goes to the basic issue of negligence or recklessness. See, *e.g.*, *Zimmerman v. Cook County Sheriff's Dept.*, 96 F.3d 1017, 1018 (7th Cir.1996) ("[t]he liability of an employer for sexual harassment by one nonsupervisory employee of another is not strict. The plaintiff must prove that the employer was negligent in having failed to discover and prevent it"). If negligence is the theory applicable to the case, then the question whether the plaintiff invoked a company's established sexual harassment policy or otherwise gave effective notice to the company is plainly relevant.

Section 219(2)(c) provides for liability for actions outside the scope of employment when the agent's conduct violated a non-delegable duty of the master. See also § 214. Such a duty might arise under a contract, or it might arise by operation of law. The Second Restatement gives several examples, including action that is illegal unless it is licensed, highly dangerous activities, and the special duties of occupiers of land. Although employers plainly have a duty under Title VII to operate a workplace free from discrimination, including sexual harassment, we do not read *Meritor* and *Harris* as holding that this duty is the special kind of non-delegable one referred to in § 214. This would, in effect, be the automatic liability rule that the *Meritor* Court rejected. But see Justin S. Weddle, "Title VII Sexual Harassment: Recognizing an Employer's Non-Delegable Duty To Prevent a Hostile Workplace," 95 Colum.L.Rev. 724 (1995).

Finally, § 219(2)(d) covers situations in which "the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was

aided in accomplishing the tort by the existence of the agency relation." Our sister circuits have read this language two ways. In *Bouton v. BMW of North America, Inc.*, 29 F.3d 103, 108 (3d Cir.1994), the Third Circuit found that this language referred only to the apparent authority theory, albeit by phrasing it in two different ways. The Second Circuit took a different view in *Karibian v. Columbia Univ.*, 14 F.3d 773, 780 (2d Cir.1994), where it held employers absolutely liable under the first clause for sexual harassment enabled by apparent authority and under the second clause for sexual harassment enabled by delegated authority. Both Ellerth and the Equal Employment Opportunity Commission, as amicus curiae, urge us to follow the Second Circuit's approach here, while Burlington argues that the Third Circuit had it right.

In our view, the correct answer lies somewhere between the two. The first clause of § 219(2)(d) plainly implicates the well known apparent authority theory of agency law. Section 8 of the Second Restatement defines "apparent authority" as "the power to affect the legal relations of another person by transactions with third persons, *professedly* as agent for the other, arising from and in accordance with the *other's manifestations to such third persons*." (Emphasis added.) See also 2A C.J.S. Agency § 157a (1972) (apparent authority is "such power that a principal holds his agent out as possessing or permits him to exercise under such circumstances as to preclude a denial of its existence."). In *Faber-Musser Co. v. William E. Dee Clay Mfg. Co.*, 291 Ill. 240, 126 N.E. 186, 188 (1920), the Illinois Supreme Court defined apparent authority as the authority a reasonably prudent person would naturally suppose, or that which the agent appears to have by reason of his actual authority.

Under the first clause of § 219(2)(d), therefore, the principal will be liable where the agent misrepresented the

existence or scope of an agency relation, and it was reasonable under the rules of apparent authority for a third party to believe him. In such cases, the principal is held liable because of manifestations that made it reasonable for a third party to believe that the agent acted with authority. The issue of whether there was apparent authority does not arise on our facts at all. No one doubts that Slowik was a Vice President for Burlington, and thus that he was its agent in some respects.

Section 219(2)(d), clause 2, covers cases where the servant was aided in accomplishing the tort by the existence of the agency relation. On its face, this refers to the powers conferred by an agency relation, as opposed to "apparent authority" to act as an agent at all, which is the way the term is used in the first clause and § 8. Rather than misrepresenting his agency relation, as in the first clause, in these cases the agent misapplies the powers delegated by the principal, which he is able to do because of apparent authority. The language of § 261, to which Comment e of § 219(2)(d) refers, makes this clear: "[a] principal who puts a servant or other agent in a position which enables the agent, while apparently acting within his authority, to commit a fraud upon third persons is subject to liability to such third persons for the fraud." The employee, by definition in these cases, is acting outside the scope of employment, but the employer is liable nonetheless because, by giving the employee particular powers and holding him out as an agent, the employer enabled the employee to commit a tort under the guise of apparent authority. One of the examples in Comment e to § 219(2)(d) lends further support to this reading. It states that liability will exist in the case of a servant who "may be able to cause harm because of his position as agent, as where a telegraph operator sends false

messages purporting to come from third persons." Although the principal is entirely innocent in such cases, liability is based on the fact that the principal placed the agent in a position, undetectable to reasonable third parties, that enabled the tort. See *id.* § 261 cmt. a. In the final analysis, it is the abuse of delegated authority, coupled with the victim's reasonable perception of apparent authority, that forms the basis of liability.

In Ellerth's case, the delegated authority theory of the second clause could come into play if further development of the facts indicates that Slowik was not acting within the scope of his actual authority, but she reasonably believed that he was empowered to take certain actions. Again, this would not require a finding that Burlington created the impression that Slowik was authorized to commit sexual harassment. It could no more do that than it could give him apparent or actual permission to engage in racial discrimination in hiring, or to refuse to accommodate an employee's legitimate religious needs, or to discriminate against the disabled. As in the case of the scope of employment issue discussed above, the § 219(2)(d) apparent scope of authority question relates to the authority Slowik appeared to have as Burlington's agent: for example, could he hire and fire employees at Ellerth's level; could he control work assignments; could he require someone to relocate from Chicago to New York; how extensive a budget did he control? Understood this way, apparent scope of authority would be important here only if Slowik's actual authority over Ellerth's job were less than it appeared to be. If Slowik's exercise of delegated authority led Ellerth to believe (reasonably) that he could cause her to be fired, even if he could not, then conduct outside the scope of his employment might be actionable under the second clause of § 219(2)(d). *Cf. North v. Madison Area Ass'n for*

Retarded Citizens-Developmental Ctrs., 844 F.2d 401, 407 (7th Cir.1988). If, for example, Slowik required Ellerth to attend meetings with him, endure harassing telephone calls, subject herself to unwanted touching, and the like, because he used his delegated authority as Vice President to create the impression that he had plenary power over her employment position, the second clause of § 219(2)(d) would provide a basis for holding Burlington responsible for his actions. See also *Champion v. Nationwide Security, Inc.*, 450 Mich. 702, 545 N.W.2d 596, 601 (1996) (employer liable where supervisor used his delegated power to place subordinate in situation that facilitated rape).

As is the case with liability for actions within the scope of employment, the existence of a policy forbidding sexual harassment does not alter the employer's liability under § 219(2)(d). Such a policy tells the employee nothing about the breadth of the supervisor's duties and powers within the company, which is the only relevant question, and there is obviously never a case in which a company could confer either actual or apparent authority to violate the law.

The requirement of apparent authority brings an objective element to the analysis that avoids the hazards of both the Second Circuit's interpretation in *Karibian*, which runs the risk of imposing absolute liability on employers for the intentional torts of employees, and the Third Circuit's view in *Bouton*, which too easily excuses employers from making efforts to protect vulnerable subordinates. As we implied in *Baskerville v. Culligan International Co.*, 50 F.3d 428 (7th Cir.1995), when a supervisor's harassing conduct is outside the scope of employment, the facts must show that the plaintiff was reasonable in believing the supervisor acted with authority. If so, then liability would follow under the principles of § 219(2)(d). If not, then the employer will be

liable only if it was negligent or reckless. See § 219(2)(b); *Baskerville*, 50 F.3d at 432.

IV

In summary, we conclude that Ellerth's complaint was broad enough to encompass both *quid pro quo* and hostile work environment sexual harassment. Ellerth's evidence would permit a finding that Slowik's conduct, under the governing agency principles, was undertaken within the scope of his employment with Burlington. She therefore presented enough to withstand Burlington's summary judgment motion. Under this theory, her failure to complain formally under Burlington's sexual harassment policy will not be fatal to her claim. (We make no comment on the relevance of Ellerth's complaints to other Burlington employees and supervisors, which may be pertinent on remand as well.) Policies that make clear the unacceptable nature of sexual harassment and that establish effective systems for its prevention and redress are extremely valuable, both in cases that must proceed on the basis of a negligence theory, and as a healthy dose of preventive medicine. However, as this Court noted in *Baskerville*, supra at 431, when harassment takes the form of an abuse of authority, agency principles will often permit liability even without employer negligence.

The decision of the district court is REVERSED and the case is REMANDED for further proceedings consistent with this opinion.

ORDER

Jan. 28, 1997

The petition for rehearing with suggestion for rehearing en banc in the above-entitled case is GRANTED, the panel decision is VACATED, and the appeal is restored to the calendar for oral reargument before the full court at a date and time to be announced.

APPENDIX C

United States District Court,
N. D. of Illinois
Eastern Division.

No. 95 C 839.

Kimberly B. Ellerth,

Plaintiff,

v.

Burlington Industries, Inc.,

Defendant.

Jan. 19, 1996.

Employee sued her former employer for sex discrimination and constructive discharge under Title VII. Employer moved for summary judgment. The District Court, Castillo, J., held that: (1) fact question as to whether supervisor's actions were so severe as to create hostile work environment precluded summary judgment under that theory, but (2) employer was not responsible for supervisor's actions.

Summary judgment granted.

MEMORANDUM OPINION AND ORDER

CASTILLO, District Judge.

Plaintiff Kimberly B. Ellerth ("Ellerth") sues defendant Burlington Industries, Inc. ("Burlington") for sex discrimination and constructive discharge under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq*. Ellerth alleges that while employed at Burlington she

was inappropriately touched and sexually harassed by her superior, Theodore Slowik, subjecting her to a hostile work environment in violation of Title VII's prohibition against discrimination on the basis of sex. 42 U.S.C. § 2000e-2(a)(1). Ellerth also contends that Slowik's harassment of her resulted in her constructive discharge. Burlington's motion for summary judgment is presently before the Court. After careful review, the Court finds that there is no genuine issue of material fact and judgment should be entered for Burlington on both counts of Ellerth's complaint as a matter of law.

RELEVANT FACTS

The following undisputed facts are gleaned from the parties' respective Local Rule 12 statements of material facts and accompanying exhibits.[1] Burlington is a manufacturer of

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[1] The following facts are drawn from the parties' respective Local General Rule 12(M) and (N) statements of material facts as to which there is no genuine issue, and the accompanying exhibits, *see* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS LOCAL GENERAL RULE 12. Local General Rule 12(M)(3) requires a party moving for summary judgment to file "a statement of material facts as to which the moving party contends there is no genuine issue." The movant's statement must contain "specific references to the affidavits, parts of the record, and other supporting materials relied upon to support the facts set forth." Burlington's statement shall be cited herein as "Def.'s Facts ¶ —." Similarly, Local General Rule 12(N)(3)(a) requires the nonmoving party to file a concise response to the movant's statement including, in the case of any disagreement, specific references to supporting materials. Ellerth's response shall be cited as "Pls.' Facts ¶ —." Pursuant to Local General Rule 12(N)(3)(b), the nonmoving party may also submit a statement of "additional facts that require the denial of summary judgement," with respect to which the movant, in turn, may respond. Ellerth did not file any such statement of additional facts. Instead, Ellerth frequently raised additional factual matters in her Rule 12(N)(3)(a) response by means of such expressions as: "Admit [or deny as the case may be]. *Ellerth adds*, *however* . . ." The problem with Ellerth's departure from the Rules is that it affords Burlington no mechanism for responding to Ellerth's additional facts—there is no such thing, for example, as a reply to the nonmoving party's Rule 12(N)(3)(a) response. Accordingly, Burlington asks the Court to disregard the "tainted" portions of Ellerth's response. Of course, this is not a particularly proper means of requesting action by a court. Essentially, Burlington seeks an Order from the Court striking Ellerth's response. As Federal Rule of Civil Procedure 7 instructs, "An application to the court for an order shall be by motion," not by way of a "request" stuck in a footnote in a reply brief. Had Burlington filed an appropriate motion, this issue could have been taken up by the parties in a timely fashion. Instead, here the Court sits with a fully briefed dispositive motion, with one party requesting this Court to disregard this or that factual assertion.

It strikes the Court that there are several alternatives here. First, the Court could attempt to "disregard" portions of Ellerth's 12(N)(3)(a) submission as Burlington requests. This approach would entail a somewhat artificial parsing of Ellerth's response and would not substantially serve the ends of justice. Alternatively, the Court could strike Ellerth's response and direct her to file an appropriate Rule 12(N)(3)(a) statement and a Rule 12(N)(3)(b) statement (if that is her desire), to which Burlington could then formally respond. Or, the Court could simply grant Burlington time to respond, if it desires, to Ellerth's Rule 12(N)(3)(a) submission—thereby affording Burlington the opportunity to controvert any "additional factual assertions" made by Ellerth. Of course, Burlington has not indicated that it desires any opportunity to respond or that it believes Ellerth's factual representations are incorrect. Both of these latter approaches involve needless delay. Accordingly, having carefully and fully considered all of the materials before it, the Court concludes that the wisest course here is to deny Burlington's request and to consider all factual assertions made by Ellerth (to the extent that they are supported by the record). However, unlike properly presented 12(N)(3)(b) factual assertions, the Court will not deem them admitted as a result of Burlington's failure to properly respond.

textiles and home furnishings which employs over 22,000 people and operates more than 50 plants and offices around the United States, including a Chicago office. (Def.'s Facts ¶¶ 2, 5). Ellerth first interviewed with Burlington in mid-March 1993, at which time she was interviewed by Mary Strenk Fitzgerald ("Fitzgerald"). Fitzgerald was a national

accounts manager in Burlington's Mattress Fabric (or "Ticking") division. Shortly after the Fitzgerald interview, Ellerth had a second interview, this time meeting with Theodore Slowik ("Slowik"), who holds the position of vice president of sales and marketing for Burlington's House Mattress Ticking division and who works out of Burlington's New York office. About one week later, Fitzgerald called Ellerth to offer her the position of merchandising assistant in the Chicago office. Ellerth accepted.

As a merchandising assistant, Ellerth assisted Fitzgerald in her day to day activities. She also spoke with Slowik by phone approximately once per week. Additionally, Ellerth's position required occasional travel, generally for training-related purposes. Ellerth's immediate supervisor while she held this position was Fitzgerald. (*Id.* ¶ 11). Fitzgerald reported directly to Slowik. (Pl.'s Facts ¶ 11).

In February and March of 1994, following interviews with Patrick Lawrence and Slowik, Ellerth received a promotion to the position of sales representative for the Ticking Division's Midwest territory. (Def.'s Facts ¶ 12). Lawrence became Ellerth's immediate supervisor after that promotion. In turn, Lawrence reported to Slowik.

Throughout her employment at Burlington, Ellerth saw Slowik when he came to Chicago, on average, for a day or two every month or two. (*Id.* ¶ 17). In addition, Ellerth states that she saw Slowik when she traveled to New York, North Carolina and San Francisco for training, and that she spoke with Slowik approximately once a week. (Pl.Dep. at 49, 58, 93-94, 131, 215-216).

Ellerth claims that Slowik's harassment of her began as early as her preemployment interview with him. Ellerth contends that during that interview, Slowik asked her if she was married, if she planned on having a family, and if she

was "practicing" to have a family. Ellerth further alleges that Slowik stared at her in a sexual way such as staring at her chest for prolonged periods of time, and staring at her legs. Ellerth contends that the stares were constant throughout the entire interview and that she felt "humiliated" during the interview. (Def.'s Facts ¶ 18). Notwithstanding this experience, after the interview, Ellerth sent a follow-up letter to Fitzgerald in which she wrote, "I appreciated the chance to meet with Mr. Slowik before he returned to New York. The insight that he gave me into the position only provided me with more incentive to take the job he offered."

The next time Ellerth saw Slowik—the summer of 1993, when she travelled to New York for training—the harassment allegedly continued. (Def.'s Facts ¶ 20). Ellerth was in New York for approximately five days. Although she could not recall the exact number of times she saw Slowik in New York, Ellerth testified that she had more than five conversations, most lasting about five minutes, but two that were longer (about an hour) in duration. The first of these two longer conversations took place in Slowik's office. Slowik allegedly told one off-colored joke at the end of that conversation. Ellerth does not remember the content of the joke. (*Id.* ¶¶ 22, 23; Ellerth Dep. at 57-66). Ellerth testified that there were "around four" incidents during her training trip to New York in which Slowik told off-colored, offensive jokes. (*Id.* ¶ 23; Ellerth Dep. at 63, 65).

The second extended conversation Ellerth had with Slowik in New York took place during a lunch meeting at a restaurant near Burlington's New York office in which Angelo Brenna, Burlington's vice president of international sales, was also present. The lunch lasted approximately one to one and a half hours during which time Ellerth claims Slowik told "well over ten," offensive jokes of a sexual nature. Although she could not recall the exact number of

offensive jokes, Ellerth testified that they were frequent and constant. (Def.'s Facts ¶ 24; Ellerth Dep. at 70-71). Ellerth also testified that during one of these jokes, Slowik reached over and rubbed her knee under the table. Ellerth pulled her leg away and said nothing to Slowik or Brenna; Ellerth assumed Brenna had not seen the rubbing. (Def.'s Facts ¶ 24; Ellerth Dep. at 75-76). While walking back to the Burlington office after lunch, Ellerth was walking about three or four feet in front of Slowik and Brenna when Slowik allegedly commented, "you have got great legs, Kim. What do you think, Angelo?" (*Id.* ¶ 25). Ellerth testified that, after that remark was made, she turned and looked at Slowik who was staring at her legs. (Ellerth Dep. at 81). Ellerth testified that when she returned to the office after lunch, she told two women, one named Marilyn and the other named Laura Peffal, that Slowik and Brenna had been "very loud and obnoxious and rude and very offensive at lunch." (Pl.Dep. at 82-83). Ellerth had no other interactions with Slowik in New York.

Following the New York trip, Ellerth has no specific recollection of seeing or speaking with Slowik until approximately one month later when she traveled to Greensboro, North Carolina for additional training.[2] Ellerth was in North Carolina for one work week (i.e., Monday through Friday). (Def.'s Facts ¶ 27). Ellerth first saw Slowik in North Carolina about three days after she arrived, when she

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[2] Ellerth specifically stated that she could not recall talking to Slowik between the New York trip and the North Carolina trip. (Ellerth Dep. at 163). Immediately thereafter she stated that Slowik had called her "before [her] training visits to ask [her] questions if Betsy [Fitzgerald] was not around." (*Id.*) Ellerth further stated that every single time she talked to him on the phone, Slowik made a sexually inappropriate comment to her. (*Id.* at 164.) Other than "Kim, how are your legs," Ellerth could not recall any specific comments. (*Id.*)

had dinner with Slowik, a sales representative named Dan, and Dan's wife. Ellerth states that Slowik was loud and obnoxious during dinner and gave the waitress a hard time. Ellerth's deposition testimony regarding the nature of Slowik's offensive conduct *vis-a-vis* the waitress is indefinite at best. She testified that she did not recall how Slowik was giving the waitress a hard time. When first asked if he was giving the waitress a hard time "in a sexual way" or "making offensive sexual comments to her," Ellerth stated that she could not recall. (Ellerth Dep. at 103). Upon further inquiry, Ellerth responded that Slowik's comments were "probably" about the waitress' appearance because that is what Ellerth would find offensive. (*Id.*; *see also id.* at 117 ("I recall that I was very offended with what he said to the waitress, and I know the only way that I would be offended or embarrassed is if there was a situation where he was talking sexually offensive")).

Upon returning to the hotel after dinner, Slowik invited Ellerth to accompany him to the hotel lounge. Ellerth accepted. Ellerth testified that, while in the lounge, Slowik commented about the female band members stating that they had nice breasts, nice legs and nice, skimpy outfits. (Def.'s Facts ¶ 29). Ellerth further states that, regarding breasts, Slowik asked, "[y]ou are a little lacking in that area, aren't you Kim?" Ellerth did not reply to Slowik's comments and she claims that Slowik told her that she "ought to loosen up." (*Id.*). At the bar, Slowik allegedly engaged in prolonged looks at Ellerth's breasts and legs. Upon leaving the bar, Ellerth claims that Slowik stated, "You know, Kim, I could make your life very hard or very easy at Burlington." (*Id.*). Ellerth understood this comment to mean that she would have to have sex with Slowik to succeed at Burlington. (Ellerth Aff. ¶ 22). Ellerth could not recall seeing Slowik again during

her week in North Carolina, and believed that that evening was the only time she talked to him that week.

Following the North Carolina trip, Ellerth next specifically recalled seeing Slowik in the fall of 1993 when he visited the Chicago office.[3] Ellerth was on the floor folding fabric samples when Slowik walked by with another employee and allegedly commented, "on your knees again, Kim?" (Def.'s Facts ¶ 32). Ellerth understood the comment to be a reference to fellatio, which she found to be degrading and offensive. (Ellerth Aff. ¶ 27). On another occasion during which Slowik was in the Chicago office in the fall of 1993, he was making phone calls from Ellerth's office and when she walked in to the office, Slowik commented, "It's nice to have my butt where your butt was, Kim." (Def.'s Facts ¶ 34).

The next specific incident in which Ellerth could recall seeing Slowik was at the company holiday party in December, 1993. Ellerth claims that Slowik approached her husband, patted him on the shoulder and said, "You are a lucky man to have a woman like that," referring to the plaintiff. (Ellerth Dep. at 148). In addition, plaintiff alleges that Slowik patted her rear as he walked past her during the party. (Def.'s Facts ¶ 35).

The next incident that Ellerth could specifically recall in which she saw Slowik was her promotion interview in March

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[3] In her deposition, Ellerth testified that she believed that there was at least one other time, between the summer and fall of 1993, when Slowik was at the Chicago office, but she had no specific recollection of seeing him. (Ellerth Dep. at 130-31).

of 1994.[4] At this interview, Ellerth claims that Slowik agreed he had told others that she was "arrogant" because she was not "loose enough" for him, and that this gave him hesitations about promoting her. (Def.'s Facts ¶ 36; Ellerth Dep. at 199). Ellerth also states that Slowik reached over and rubbed her knee during the interview, and when discussing the travel associated with the new position, Slowik asked, "isn't your husband going to miss you." (Def.'s Facts ¶ 36). When he called to inform her that she had received the promotion, Slowik allegedly made a sexually inappropriate comment that caused Ellerth to cry. She could not recall the comment.[5] (Def.'s Facts ¶ 37).

Later that same month, plaintiff traveled to San Francisco for a bedding conference. Ellerth claims that she saw Slowik often but for the first three or four days Slowik ignored her. Ellerth believes that this was because she had not responded favorably to his harassment. (Pl.Dep. at 216, 244). However, on the last day of the conference, Slowik allegedly made a sexually inappropriate comment to Ellerth about her "ass." (Def.'s Facts ¶ 38). Slowik allegedly was staring at Ellerth's "back end" when he made this comment. (Ellerth Dep. at 247). The incident caused Ellerth to run to the bathroom to cry.

The foregoing incidents involve Ellerth's face-to-face interactions with Slowik. During her employment at Burlington, Ellerth spoke with Slowik by phone repeatedly;

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[4] Ellerth testified that there were other occasions, following the holiday party and prior to her promotion interview in March of 1994, when Slowik was at the Chicago office and said things to her that upset her; however, she had no specific recollection of those incidents.

[5] Ellerth testified that "every time I was on the phone with him I ended up most—in tears." (Ellerth Dep. at 206-07).

Ellerth claims that Slowik's harassment of her was a common feature of these phone conversations. The conversations were brief—usually Slowik would ask a work-related question and Ellerth would answer. Ellerth estimated that the frequency of these calls was approximately once per week. (Ellerth Dep. at 131, 163). Although Ellerth testified that Slowik did not tell vulgar jokes on the phone, she stated that "there were sexual innuendos on the phone, all phone conversations." (*Id.* at 132). As specific examples of Slowik's comments, Ellerth recalled being asked by Slowik, "How are those legs of yours, Kim?" Slowik also asked Ellerth if she was still practicing having a family with her husband. (*Id.* at 132-33). In a phone conversation that occurred in February or March of 1994, Slowik allegedly said to Ellerth that it "must be hard for a woman like you, Kim, to have a job like that—a woman with great legs." (*Id.* at 172, 174). In a phone conversation that occurred in April of 1994, Slowik allegedly told Ellerth "a very offensive joke about blonds, a limo and sex." (*Id.* at 253). Although she could not recall the specifics of the joke during her deposition, Ellerth has submitted an affidavit along with her opposition to the instant motion for summary judgment in which she recounts the joke as follows: "What's the difference between a blonde and a limo? Not everyone's been in a limo." (Ellerth Aff. ¶ 45). On another occasion, when Ellerth was talking to Slowik to get special permission to do something for a customer, Slowik said something along the lines of "I don't have time for you right now, Kim, unless you're telling me—unless you want to tell me what you are wearing." Ellerth said she had to go and hung up. On a follow up call, again to get permission, Slowik told Ellerth that she did not have permission for the project and he then said something along the lines of "are you wearing shorter skirts yet, Kim, because it would make your job a whole heck

of a lot easier." (*Id.* at 256-58). These latter calls occurred in about May of 1994.

Ellerth was aware throughout her employment that Burlington maintained a policy against sexual harassment. (Pl.Dep. at 358). She received a copy of Burlington's employee handbook and read the policy against sexual harassment in the handbook. (*Id.*; Def.'s Facts ¶ 42). Ellerth chose not to inform her supervisors or anyone in authority regarding Slowik's conduct because her husband advised her not to say anything to anyone because it would jeopardize her job. (Pl.'s Facts ¶ 43). Ellerth never informed Fitzgerald or Lawrence, her direct supervisors, about the alleged harassment while she was employed at Burlington. (Def.'s Facts ¶¶ 44, 45). Ellerth stated that she chose not to inform Lawrence because "it would be his duty as my supervisor to report any incidents of sexual harassment," thus putting her job in jeopardy. (Def.'s Facts ¶ 45; Pl.Dep. at 357). Ellerth claims that she told several Burlington employees and one Burlington customer that she was being harassed by Slowik.[6] Ellerth admits that none of the employees were her superiors. (Pl.'s Facts ¶ 46). Ellerth did complain to her husband and parents on numerous occasions that Slowik sexually harassed her from the beginning of her employment with Burlington. (Def.'s Facts ¶ 47). On one occasion, after Slowik made an "embarrassing and humiliating" sexual innuendo, plaintiff claims that she told Slowik that what he said was inappropriate. (Rule 12(M) ¶ 48; Pl.Dep. at 143-145).

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[6] Each individual denies that Ellerth ever complained of sexual harassment by Slowik. However, in a motion for summary judgment, this Court must look at all evidence in the light most favorable to the non-moving party. Therefore, the Court will assume that plaintiff informed these individuals of the alleged harassment for purposes of this motion.

In May of 1994, approximately two months after Ellerth received her promotion, Lawrence and Donna Thibideau, Burlington's Customer Service manager received some complaints about Ellerth. (Pl.'s Facts ¶ 14). Lawrence sent Ellerth a memorandum on May 22, 1994 regarding the complaints he had received. (Def.'s Facts ¶ 15; Ellerth Dep., Ex. 2). On May 31, 1994, Ellerth left a message on Lawrence's answering machine informing him that she was quitting. She also faxed him a letter to the same effect. The letter received by Lawrence did not mention that plaintiff had been sexually harassed by Slowik. (Def.'s Facts ¶ 16). Ellerth claims that the letter she transmitted to Lawrence did not refer to the sexual harassment because, on her husband's advice, she had redacted the sentences she had written regarding her harassment. (Pl.'s Facts ¶ 16). (Rule 12(M) ¶ 16). About three weeks later, in a letter dated June 21, 1994, Ellerth wrote to Lawrence, essentially stating that she had quit because she was being harassed by Slowik. (Pl.'s Ex. I).

DISCUSSION

Summary Judgment Standards

Summary judgment is proper only if the record shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. FED.R.CIV.P. 56(c). A genuine issue for trial exists only when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). The court must view all evidence in a light most favorable to the nonmoving party, *Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 822 F.2d 656, 659 (7th Cir.), *cert. denied*, 484 U.S. 977, 108 S.Ct. 488, 98 L.Ed.2d 486 (1987), and draw all inferences in the nonmovant's favor. *Santiago v. Lane*, 894 F.2d 218, 221 (7th Cir.1990).

However, if the evidence is merely colorable, or is not significantly probative, summary judgment may be granted. *Liberty Lobby*, 477 U.S. at 249-50, 106 S.Ct. at 2510- 11; *Flip Side Productions, Inc. v. Jam Productions, Ltd.*, 843 F.2d 1024, 1032 (7th Cir.), *cert. denied*, 488 U.S. 909, 109 S.Ct. 261, 102 L.Ed.2d 249 (1988). In determining whether a genuine issue exists, the court "must view the evidence presented through the prism of the substantive evidentiary burden." *Liberty Lobby*, 477 U.S. at 254, 106 S.Ct. at 2513. In making its determination, the court's sole function is to determine whether sufficient evidence exists to support a verdict in the nonmovant's favor. Credibility determinations, weighing evidence, and drawing reasonable inferences are jury functions, not those of a judge when deciding a motion for summary judgment. *Liberty Lobby*, 477 U.S. at 255, 106 S.Ct. at 2513-14. Finally, we note that mere conclusory assertions, unsupported by specific facts, made in affidavits opposing a motion for summary judgment, are not sufficient to defeat a proper motion for summary judgment. *See Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 888, 110 S.Ct. 3177, 3188-89, 111 L.Ed.2d 695 (1990) ("The object of [Rule 56(e)] is not to replace conclusory allegations of the complaint or answer with conclusory allegations of an affidavit."); *First Commodity Traders, Inc. v. Heinold Commodities, Inc.*, 766 F.2d 1007, 1011 (7th Cir.1985) ("Conclusory statements in affidavits opposing a motion for summary judgment are not sufficient to raise a genuine issue of material fact").

Hostile Environment Sexual Harassment

Title VII prohibits "discriminat[ion] . . . against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex. . . ." 42 U.S.C. § 2000e- 2(a)(1). Title VII's prohibition against sex discrimination includes sexual

harassment in the workplace. *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 65, 106 S.Ct. 2399, 2404-05, 91 L.Ed.2d 49 (1986). Courts commonly distinguish between two types sexual harassment: *quid pro quo* harassment and hostile work environment harassment. *Quid pro quo* harassment occurs where the employer conditions tangible employment benefits on submission to sexual demands. *See Dockter v. Rudolf Wolff Futures, Inc.*, 913 F.2d 456, 461 (7th Cir.1990). To establish harassment of the hostile work environment type, the plaintiff must establish that the challenged conduct " 'has the purpose or effect of unreasonably interfering with [the] individual's work performance or creating an intimidating, hostile or offensive working environment.' " *Meritor*, 477 U.S. at 65, 106 S.Ct. at 2405 (quoting 29 C.F.R. § 1604.11(a)(3)). Significantly, *Meritor* held that "[f]or sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.' " *Id.* at 67, 106 S.Ct. at 2405 (quoting *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir.1982)). As the Seventh Circuit recently noted:

> To determine whether the plaintiff's work environment is hostile within the meaning of Title VII, we consider a variety of factors, including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."

Saxton v. American Tel. & Tel. Co., 10 F.3d 526, 534 (7th Cir.1993) (quoting *Harris v. Forklift Sys. Inc.*, 510 U.S. 17, ——, 114 S.Ct. 367, 371, 126 L.Ed.2d 295 (1993)); *see also Doe v. R.R. Donnelley & Sons Co.*, 42 F.3d 439, 443 (7th Cir.1994) (noting that "not all conduct that has sexual

overtones can be characterized as the sort of sexual harassment that is forbidden by the statute. For the harassment to be actionable, it must be sufficiently severe or pervasive as to alter the conditions of the victim's employment and to create an abusive working atmosphere."); *Koelsch v. Beltone Electronics Corp.*, 46 F.3d 705, 708 (7th Cir.1995) ("Isolated and innocuous incidents do not support a finding of sexual harassment."). The inquiry focuses on the totality of the circumstances and no single factor is required or determinative. *Id.* Finally, these factors are evaluated from both a subjective and objective viewpoint. That is, the actual effect of the conduct on the plaintiff is considered as is the likely impact on a reasonable person in the plaintiff's position. *Id.*; *Doe*, 42 F.3d at 444; *Dey v. Colt Constr. & Dev. Co.*, 28 F.3d 1446, 1454-57 (7th Cir.1994).

In the instant case, and for purposes of this motion only, Burlington does not dispute the occurrences of Slowik's harassing conduct as alleged by Ellerth.[7] Rather, Burlington advances several arguments as to why, as a matter of law, it can not be found liable for Slowik's conduct. First, Burlington contends that Ellerth's complaint is untimely as to most of the alleged conduct and that the remaining conduct does not amount to actionable sexual harassment because it is not sufficiently severe or pervasive. In this regard, Burlington contends that Ellerth cannot invoke the "continuing violation" doctrine to bring the untimely conduct within the ambit of her complaint. Burlington's second principal contention is that it cannot be held liable for Slowik's conduct because it did not know, or have reason to

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[7] In light of Burlington's admission on this point, the Court will dispense with the hedge "allegedly," as in "Slowik 'allegedly' rubbed Ellerth's knee."

know, of Slowik's conduct. We address these arguments in turn below.

1. *Timeliness and the Continuing Violation Doctrine*

As Burlington correctly observes, in Illinois a complainant must file a charge of discrimination within three hundred days of the alleged harassment. Conduct occurring more than 300 days before the filing of a charge of discrimination cannot be the sole basis of a Title VII sexual harassment claim. *Koelsch*, 46 F.3d at 707. Ellerth filed her charge of discrimination on October 17, 1994; therefore, only conduct that took place after December 20, 1993 can serve as the basis for Ellerth's recovery under Title VII, unless the continuing violation doctrine applies. Under that theory, acts of discrimination that are otherwise time-barred may be actionable under certain limited circumstances. *See, generally, Stewart v. CPC Int'l, Inc.*, 679 F.2d 117 (7th Cir.1982); *Selan v. Kiley*, 969 F.2d 560 (7th Cir.1992).

This Court recently discussed the parameters of the continuing violation theory in *Egan v. Palos Community Hosp.*, 889 F.Supp. 331, 334-337 (N.D.Ill.1995). There, we noted that the Seventh Circuit has recognized three viable theories under which a plaintiff may successfully appeal to the continuing violation theory. See *id.* at 335. Only one of those theories, the "serial violation" or "pattern of ongoing discrimination" theory is relevant here, and we confine our discussion to that theory. The Seventh Circuit has described this theory as applying to:

> cases in which the plaintiff charges that the employer has, for a period of time, followed a practice of discrimination, but has done so covertly, rather than by way of an open notorious policy. . . . In such cases the challenged practice is evidenced only by a series of discrete, allegedly discriminatory,

> acts. This brand of continuing violation has also been referred to as a "serial violation," *Mack*, 871 F.2d at 183, and as a "pattern of ongoing discrimination." *Santos v. Rush-Presbyterian-St. Luke's Med. Ctr.*, 641 F.Supp. 353, 357 (N.D.Ill.1986).

Selan, 969 F.2d at 565. In order to invoke this variant of the continuing violation doctrine, Ellerth must show that defendant's acts were "related closely enough to constitute a continuing violation" rather than constituting "merely discrete, isolated, and completed acts which must be regarded as individual violations." *Id.* (internal quotation marks omitted). As we summarized in *Egan*, the pertinent factors to consider in making this distinction are:

> (1) subject matter—"Do the alleged acts involve the same type of discrimination tending to connect them in a continuing violation?" *id.*; (2) frequency—"Are the alleged acts recurring (e.g., a bi-weekly paycheck) or more in the nature of an isolated work assignment or employment decision?" *id.*; and, (3) degree of permanence—"Does the act have the degree of permanence which should trigger an employee's awareness of and duty to assert his or her rights?" *Id.* Of these three factors, the third is the most significant. *Id.* As explained in *Malhotra v. Cotter & Co.*, 885 F.2d 1305 (7th Cir.1989):
>
> What justifies treating a series of separate violations as a continuing violation? Only that it would have been unreasonable to require the plaintiff to sue separately on each one. In a setting of alleged discrimination, ordinarily this will be because the plaintiff had no reason to believe he was a victim of discrimination until a series of adverse actions

established a visible pattern of discriminatory treatment. *Id.* at 1310.

Egan, 889 F.Supp. at 335-36. More recently, in *Moskowitz v. Trustees of Purdue University*, 5 F.3d 279 (7th Cir.1993), Judge Posner, writing for the court, explained:

> If it is only with the benefit of hindsight, after a series of discriminatory acts, that the plaintiff can realize that he is indeed a victim of unlawful discrimination, he can sue in regard to all of the acts provided he sues promptly after learning their character. . . . If, however, he knows or with the exercise of reasonable diligence would have known after each act that it was discriminatory and had harmed him, he may not sit back and accumulate all the discriminatory acts and sue on all within the statutory period applicable to the last one. So the fact that a series of discriminatory or otherwise unlawful acts is indeed a series, a continuum, rather than a concatenation of unrelated acts, will delay the deadline for suing with respect to the earliest acts in the series only if their character was not apparent when they were committed but became so when viewed in the light of the later acts.

Id. at 281-82. *See also Doe*, 42 F.3d at 446 (noting that "the purpose of permitting a plaintiff to maintain a cause of action on the continuing violation theory is to permit the inclusion of acts whose character as discriminatory acts was not apparent at the time they occurred").

Ellerth's deposition testimony leaves little doubt that she was aware of the discriminatory nature of Slowik's conduct virtually from the outset of her contacts with him. She testified that Slowik's question during her initial interview about whether she was married was "inappropriate" and the

question about whether she was practicing to have a family with her husband was "offensive" and "humiliating." *See* Pl.'s Facts ¶ 8. Indeed, she told her husband and her mother about Slowik's conduct. Ellerth Dep. at 92. However, she "did not complain about Slowik's offensive behavior during his initial interview . . . in the 'follow-up' letter that [she] sent . . . because Slowik's initial interview of me was merely the first incident in Slowik's campaign of sexual harassment against me and I was still hoping, at that point, that by ignoring Slowik's sexual harassment he might cease such behavior on his own." Ellerth Aff. ¶ 8. We have no reason to question Ellerth's approach to dealing with Slowik's harassment; however, it is plain from her own account that she was aware of the nature of his conduct.

Then, a couple of months later when Ellerth travelled first to New York and later to North Carolina, Slowik's campaign of sexual harassment continued. Again, there can be little doubt from Ellerth's testimony that she was well aware of the harassing nature of Slowik's behavior. She referred to the jokes that Slowik told to her in his New York office as "off-colored," "dirty" and "offensive." Pl.'s Facts ¶ 23. She also testified that she could not recall more of the details concerning the joke Slowik told during her first long meeting with him in New York "because it had offended [her] so badly." Ellerth Dep. at 64. Similarly, she characterized Slowik's conduct (specifically the rubbing of her knee) at the luncheon meeting at a New York restaurant as "highly offensive and unwelcome." Ellerth Aff. ¶¶ 12, 13. She also attested that she felt "humiliated and degraded" by Slowik's comment about her legs on the walk back to the New York office after lunch. *Id.* ¶ 14.

Ellerth also states in no uncertain terms that she was aware of the nature of the sexual harassment to which she was being subjected after Slowik's conduct during her training

visit to North Carolina. In her affidavit, after recounting Slowik's repeated comments concerning the bodies and clothes of the all-woman band in the hotel lounge, his comment about her breasts, his comment that she should "loosen up," and most significantly his comment that he "could make [her] life very hard or very easy at Burlington," Ellerth attested:

> I understood Slowik's comment, "you know, Kim, I could make your job very hard or very easy at Burlington," as clearly implying that I would have to engage in sexual relations with Slowik in order to succeed in the business. Slowik's implication that he could make my life at Burlington very hard or very easy depending on whether I engaged in sexual relations with him was clear to me given the totality of the circumstances up to that point, namely Slowik's prior inappropriate comments regarding my appearance and my intimate marital relations, his staring at my breasts and legs, and his unwelcome and offensive touchings of my knees.

Ellerth Aff. ¶ 22. In view of Ellerth's clear awareness of the fact that Slowik was engaging in sexual harassment of her—an awareness that had crystallized in her mind certainly no later than the summer of 1993, she could not "sit back and accumulate all the discriminatory acts and sue on all within the statutory period applicable to the last one." *Moskowitz*, 5 F.3d at 282. Plainly, by the summer of 1993, Slowik's discriminatory conduct had the degree of permanence that should have triggered Ellerth's awareness of and duty to

assert her rights.[8] *Selan*, 969 F.2d at 565. Accordingly, we conclude that Ellerth cannot invoke the continuing violation doctrine to bring Slowik's time-barred conduct within the scope of the instant complaint. To the extent, if any, that Ellerth can prevail in her sexual harassment suit, her recovery may only be predicated on Slowik's conduct that occurred after December 20, 1993.

2. *Hostile Work Environment*

Although Ellerth can only recover for harassment occurring after December 20, 1993, this does not require that an "iron curtain" be dropped on December 20, 1993, shielding from consideration all evidence of Slowik's conduct before that day when considering whether Ellerth was subjected to an actionable hostile work environment. *Cf. Hennessy v. Penril Datacomm Networks, Inc.*, 69 F.3d 1344, 1349 (7th Cir.1995). In *Hennessy*, the district court allowed in evidence of the employer's discriminatory conduct that occurred prior to November 21, 1991, the effective date of the Civil Rights Act of 1991. On appeal, after being found liable for sex discrimination and subject to a $300,000 punitive damage award, the employer claimed that it was improperly subject to retroactive liability because the trial court allowed the plaintiff to present evidence of pre-November 21, 1991 conduct. The Seventh Circuit squarely rejected this claim:

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[8] In opposition to Burlington's motion for summary judgment, Ellerth has submitted a summary chart of Slowik's sexual harassment, which chronicles each instance of harassment. Although the chart must be taken with a very large grain of salt (for instance, it assigns 15 instances of harassment to Ellerth's initial interview with Slowik), by Ellerth's own count, by the end of the summer of 1993 she had been subject to approximately 70 instances of harassment. *See* Pl.'s Ex. B.

> To read *Landgraf* as Penril urges would drop an iron curtain on November 21, 1991, shielding from view all evidence before that day. That would be an absurd situation as it would keep from the jury substantial evidence that could aid it in reaching a just verdict. The district court properly held that *Landgraf* did not prohibit the jury from hearing about pre-Act conduct of Penril and its agents which provided context and background regarding Hennessy's termination. . . .

Hennessy, 69 F.3d at 1349.

This Court believes that analogous reasoning permits it to consider Slowik's pre-December 20, 1993 conduct when considering the totality of Ellerth's circumstances at work and determining whether her work conditions amounted to a hostile environment.[9] It would be absurd to conclude that Slowik's conduct after December 20, 1993, had to be evaluated in a vacuum and without the context of his prior conduct. *Cf. Rodgers v. Western-Southern Life Ins. Co.*, 12 F.3d 668, 675 (7th Cir.1993) (noting that the court must consider the cumulative weight of several racial comments); *Daniels v. Essex Group, Inc.*, 937 F.2d 1264, 1274-75 (7th Cir.1991) (noting that the acts of racial harassment must be considered in the context of ten years of verbal taunting). We have little difficulty concluding that Ellerth has raised a genuine issue of material fact as to whether she was subjected to a hostile work environment as a result of Slowik's conduct.

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[9] Of course, in the event that Ellerth survives the instant motion for summary judgment and proceeds to trial, a carefully drafted jury instruction will be given to the jury instructing them as to the proper and improper use of evidence pertaining to pre-December 20, 1993 conduct.

Burlington is quick to note that only a handful of harassing incidents occurred after December 20, 1993; however, when those incidents are viewed in the context of Slowik's pre-December 20 conduct, it is clear to this Court that it cannot hold, as a matter of law, that Ellerth was not subject to a hostile work environment. A reasonable jury could easily find that Slowik's pre- December 20, 1991 conduct—specifically his repeated objectification of her body, his weekly dirty joke phone calls, and his implicit statement that life for Ellerth could be very easy or very difficult for her depending on whether she submitted to his advances—deprived her of the "right to work in an environment free from discriminatory intimidation, ridicule and insult" and materially altered the conditions of her employment. *Meritor*, 477 U.S. at 65, 106 S.Ct. at 2405. Slowik's continuation of that conduct after December 20, 1991 perpetuated the existence of that hostile environment and the severity or pervasiveness of Slowik's conduct must be evaluated with reference to his prior conduct.

Specifically, this Court believes that a reasonable jury could find that Slowik's conduct in March of 1994, during which he rubbed Ellerth's knee while engaged in a promotional interview with Ellerth, could be regarded as reinforcing Slowik's previous persistent implicit messages to her that her value was as a sex object and that her growth in the company was dependent upon her sexual availability to him. So too could the jury find with respect to the April 1994 phone conversation in which Ellerth called to request special permission to put a customer's logo into some fabric and Slowik responded, "I don't have time for you right now, Kim, unless you tell me what you're wearing." Surely, a reasonable jury could find that this comment was tantamount to saying, "I, as your supervisor will have no time for you and will not assist you unless you talk dirty to me," and that such

a statement (particularly viewed in the context of Slowik's previous "I could make life very hard for you" remark) deprived Ellerth of a workplace free from discriminatory intimidation, humiliation and insult. Of course, this is equally true with respect to Ellerth's follow-up call in which Slowik denied Ellerth's request for permission and then inquired whether she was wearing shorter skirts yet because that could make her job "a whole heck of a lot easier."

It is very important to recognize in this regard that imbedded in Slowik's harassment of Ellerth is a *quid pro quo* proposition, dating back to the summer of 1993, which a jury could reasonably find pervaded her employment at Burlington.[10] It would not be unreasonable to conclude that every effort toward achievement that Ellerth made at Burlington was tainted by Slowik's threat, "I could make life

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[10] We do not mean to suggest that Ellerth has advanced a claim of *quid pro quo* sexual harassment. She has not. Both her complaint and memorandum of law opposing Burlington's motion for summary judgment expressly indicate that the nature of Ellerth's sexual harassment claim is that she was subject to a hostile work environment. (Indeed, there is authority to the effect that for Ellerth to prevail on a theory of *quid pro quo* harassment, she would have to prove that Slowik actually withheld tangible employment benefits as a result of her failure to submit to his sexual overtures. *See Gary v. Long*, 59 F.3d 1391, 1396 (D.C.Cir.1995); *Kauffman v. Allied Signal, Inc., Autolite Div.*, 970 F.2d 178, 186 (6th Cir.1992); *Highlander v. K.F.C. Nat'l Mgmt. Co.*, 805 F.2d 644, 649 (6th Cir.1986); *Jansen v. Packaging Corp. of Am.*, 895 F.Supp. 1053 (N.D.Ill.1995).)

> Our point here is simply that where a supervisor brandishes work-related threats or promises predicated on an employee's submission to sexual conduct, an overlap between *quid pro quo* and hostile work *environment harassment develops. See* Gary *v. Long*, 59 F.3d at 1396 ("Where a supervisor's mere threat or promise of job-related harm or benefits in exchange for sexual favors does not constitute *quid pro quo* harassment, either may create or contribute to a hostile work environment.").

very hard for you." Moreover, a jury could reasonably find that Slowik's "joke," "What's the difference between a blonde and a limo? Not everyone's been in a limo," made during an April 1994 phone conversation, heaped insult upon injury by effectively communicating the message that Ellerth is a whore or a slut who sleeps with everybody.

In the final analysis, we are not persuaded by Burlington's arguments that Slowik's conduct was not severe or pervasive enough to alter the conditions of Ellerth's employment. Specifically, we reject Burlington's efforts at minimizing the pervasiveness of Slowik's harassment by noting that Ellerth saw Slowik on only a few occasions. Ellerth's testimony, which Burlington does not dispute for purposes of this motion, is that Slowik spoke with her approximately once per week and that Slowik made an offensive comment during every phone conversation. We believe that a reasonable jury could conclude that this conduct was sufficiently pervasive notwithstanding the fact that it was accomplished by long distance. The Court certainly agrees with Burlington that Ellerth's inability to recall the specifics of virtually all of Slowik's offensive comments greatly impairs the Court's ability to make a determination as to whether the comments are sufficiently severe. However, in evaluating Ellerth's conditions of employment we ask whether the discriminatory conduct is sufficiently severe *or* pervasive, *Meritor*, 477 U.S. at 67, 106 S.Ct. at 2405-06, and we cannot conclude that Slowik's conduct was not sufficiently pervasive. *See Daniels v. Essex Group, Inc.*, 937 F.2d 1264, 1270 (7th Cir.1991) (finding that although an offensive utterance alone does not give rise to Title VII liability, a pervasive pattern of racial jokes could be sufficient to sustain a hostile environment claim). Additionally, in view of the uncontested facts regarding Slowik's other comments that Ellerth could recall, we believe a jury could resolve this

uncertainty in favor of Ellerth and conclude that Slowik's comment's were sufficiently severe. *See Dey*, 28 F.3d at 1456-57. For all of the foregoing reasons, we conclude that Burlington is not entitled to judgment as a matter of law based on the contention that Slowik's conduct was not sufficiently pervasive or sever to create an actionable hostile work environment. Therefore the Court turns to the critical issue in this case: whether Slowik's alleged conduct imposes liability on his employer, Burlington.

Burlington's Liability for Slowik's Conduct

Since the Supreme Court's opinion in *Meritor*, it is clear that employers are not strictly liable for the discriminatory acts of their employees—even those employees at the supervisory or management level. *See Meritor*, 477 U.S. at 72, 106 S.Ct. at 2408. Instead, *Meritor* instructs that courts should look to agency principles when evaluating whether employers should be held liable for the discriminatory acts of their supervisors.[11] *Id.*; *see also Doe v. R.R. Donnelley &*

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[11] Now that the majority of courts of appeals that have considered the issue have held that supervisors can not be found liable in their individual capacities for their discriminatory conduct, *see, e.g., U.S. E.E.O.C. v. AIC Security Investigations, Ltd.*, 55 F.3d 1276 (7th Cir.1995); *Smith v. Lomax*, 45 F.3d 402, 403-04 & n. 4 (11th Cir.1995); *Birkbeck v. Marvel Lighting Corp.*, 30 F.3d 507, 510 (4th Cir.), *cert. denied*, 513 U.S. 1058, 115 S.Ct. 666, 130 L.Ed.2d 600 (1994); *Grant v. Lone Star Co.*, 21 F.3d 649, 651-53 (5th Cir.), *cert. denied*, 513 U.S. 1015, 115 S.Ct. 574, 130 L.Ed.2d 491 (1994); *Miller v. Maxwell's Int'l*, 991 F.2d 583, 587-88 (9th Cir.1993), *cert. denied*, 510 U.S. 1109, 114 S.Ct. 1049, 127 L.Ed.2d 372 (1994), the question of employer liability has taken on added significance. As this Court foreshadowed in *Jendusa v. Cancer Treatment Centers of Am., Inc.*, "in those cases in which agency principles lead to the conclusion that the institutional employer is not liable for the conduct of its agent, a determination that Title VII does not authorize individual liability would effectively leave the victim without an adequate remedy. . . ." 868 F.Supp. 1006, 1013 n. 9 (N.D.Ill.1994).

Sons Co., 42 F.3d 439, 445 (7th Cir.1994) ("whether sexual harassment by a supervisor can be imputed to the employer corporation is governed by the principles of agency").

Following *Meritor*, many courts of appeal have issued opinions that attempt to delineate the parameters of employer liability under general principles of agency law. *See, e.g., Tomka v. Seiler Corp.*, 66 F.3d 1295 (2d Cir.1995); *Karibian v. Columbia Univ.*, 14 F.3d 773, 780 (2d Cir.1994); *Gary v. Long*, 59 F.3d 1391, 1395 (D.C.Cir.1995); *Martin v. Cavalier Hotel Corp.*, 48 F.3d 1343 (4th Cir.1995); *Nichols v. Frank*, 42 F.3d 503, 514 (9th Cir.1994); *Bouton v. BMW of North Am.*, 29 F.3d 103, 106 (3d Cir.1994); *Hirschfeld v. New Mexico Corrections Dept.*, 916 F.2d 572, 576 (10th Cir.1990); *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1418 (10th Cir.1987); *Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554, 1559 (11th Cir.1987). To date, the Seventh Circuit has not published any opinion that provides much guidance on how agency principles are to be applied in this context. *See Jansen*, 895 F.Supp. at 1060-61. Thus, we shall look for guidance in the opinions of our sister circuits, as well as Judge Shadur's recent opinion in *Jansen v. Packaging Corp.* of Am., 895 F.Supp. 1053 (N.D.Ill.1995).

Taking their lead from *Meritor*'s reference to the Restatement (Second) of Agency ("Restatement"), 477 U.S. at 72, 106 S.Ct. at 2408, most courts have looked to the Restatement for the guiding agency principles and have looked specifically to § 219. *See* citations *supra*. As the Third Circuit summarized in *Bouton*:

> The *Restatement (Second) of Agency* § 219 provides three potential bases for holding employers liable for sexual harassment perpetrated by their employees. Section 219(1) holds employers responsible for torts committed by their employees within the scope of

> their employment. Two of the four reasons listed in § 219(2) for imposing liability when an employee acts outside the scope of employment could also apply. Under § 219(2)(b), masters are liable for their own negligence or recklessness; in a harassment case, this is typically negligent failure to discipline or fire, or failure to take remedial action upon notice of harassment. Finally, under § 219(2)(d), if the servant relied upon apparent authority or was aided by the agency relationship, the master is required to answer.

Bouton, 29 F.3d at 106. We now consider these potential bases for Burlington's liability.

Under § 219(1), the pertinent inquiry is whether Slowik's harassment of Ellerth was committed within the scope of his employment. In *Jansen*, the court found § 219(1) "plainly inapplicable" and brushed this question aside with a footnote: "Was sexual harassment within the scope of [the supervisor's] employment? Of course not." 895 F.Supp. at 1061 n. 9. Other courts have similarly held, *see Hicks*, 833 F.2d at 1417-18 ("sexual harassment simply is not within the job description of any supervisor or any other worker in any reputable business"), and we do not necessarily disagree. However, we do not believe that the question can be brushed aside quite so readily. Whether or not sexual harassment is, as the *Hicks* court put it, in the job description is quite beside the point. The Restatement makes clear that acts forbidden by the employer may nevertheless be within the scope of employment—even when consciously criminal or tortious. RESTATEMENT (SECOND) OF AGENCY (hereafter RESTATEMENT) §§ 230, 231. Sections 228 and 229 of the Restatement set out several factors relevant to determining whether the conduct of a servant falls within the scope of his or her employment. Although we will not recount all of those

factors here, we note that under § 228(1)(c) conduct of a servant is within the scope of employment if, and only if, the conduct "is actuated, at least in part, by a purpose to serve the master." RESTATEMENT § 228(1)(c). Conversely, "[c]onduct of a servant is not within the scope of employment if it is . . . too little actuated by a purpose to serve the master." *Id.* § 228(2). Section 235 and the accompanying comments are also instructive in this regard. Section 235 provides: "An act of a servant is not within the scope of employment if it is done with no intention to perform it as a part of or incident to a service on account of which he is employed." RESTATEMENT § 235. Comment a to this section explains:

> It is the state of the servant's mind which is material. Its external manifestations are important only as evidence. Conduct is within the scope of employment only if the servant is actuated to some extent by an intent to serve his master.

id., cmt. *a.*, and comment c further notes:

> The fact that an act is done in an outrageous or abnormal manner has value in indicating that the servant is not actuated by an intent to perform the employer's business. . . . In such cases, the facts may indicate that the servant is merely using the opportunity afforded by the circumstances to do the harm. Hence, unless the principal has violated a personal duty to the person injured, or unless he becomes liable because of the nature of the instrumentality entrusted to the servant, . . . he is not liable for such acts.

Id., cmt. *c*; *see also* cmt. *c* illustration 4.

We believe that there can be no per se answer to whether sexual harassment is within the scope of a supervisor's

employment but that each case must be analyzed on its own facts under the factors outlined in section 228 and 229. Certainly, it is within the realm of possibility that a supervisor's discriminatory intent could sufficiently overlap with an intent to serve the employer and that such harassing conduct could be found to be sufficiently actuated by a motive to serve the employer. Indeed, the Restatement explicitly recognizes this principle. *See* RESTATEMENT § 236 ("Conduct may be within the scope of employment, although done in part to serve the purposes of the servant. . . ."); *see also id. cmt. b* (explaining that "[t]he fact that the predominant motive of the servant is to benefit himself or a third person does not prevent the act from being within the scope of employment. If the purpose of serving the master's business actuates the servant to any appreciable extent, the master is subject to liability. . . ."). However, this Court cannot conclude that Slowik's conduct was motivated in any way whatsoever by a purpose to serve Burlington; Slowik's conduct did not serve to accomplish any authorized purpose. Accordingly, we conclude that Burlington cannot be found liable for Slowik's conduct under § 219(1).

We next consider § 219(2)(b), which subjects an employer to liability for the acts of its employees acting outside the scope of their employment where the employer was negligent or reckless. This is by far the most commonly invoked basis for imposing employer liability and the Seventh Circuit's pronouncements that employer liability is generally governed by a negligence standard, *see, e.g.*, *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428, 431-32 (7th Cir.1995) ("the criterion for when an employer is liable for sexual harassment is negligence"); *Saxton v. American Tel. & Tel. Co.*, 10 F.3d 526, 535 (7th Cir.1993); *Guess v. Bethlehem Steel Corp.*, 913 F.2d 463, 465 (7th Cir.1990), can be traced to this provision. *See North v. Madison Area Ass'n*

for Retarded Citizens, 844 F.2d 401, 407 (7th Cir.1988) (recognizing *Meritor*'s admonishment to look to traditional agency principles and noting *Meritor*'s reference to sections 219-237 of the Restatement). In this case, it is clear that Ellerth cannot invoke § 219(2)(b) as a basis for imposing liability on Burlington for Slowik's conduct. Ellerth's own testimony establishes that although she was aware of Burlington's policy against sexual harassment, she never informed her immediate supervisor, Pat Lawrence, about Slowik's harassment because she feared it would put her job in jeopardy. Ellerth's deposition testimony was as follows:

> Q. Why didn't you ever tell Patrick Lawrence that you had been harassed?
>
> A. I didn't tell Pat because I was afraid that when Ted was confronted with this that my job would be more difficult.
>
> . . . . . .
>
> Q. So how would telling Patrick Lawrence put your job in jeopardy?
>
> A. Because it would be his duty as my supervisor to report any incidents of sexual harassment.
>
> . . . . . .
>
> Q. And that's why you didn't tell him because he had a duty to report it?
>
> A. I would have hoped that he would do his job to report it, but I did not want to tell him about it because he would report it thus putting my job in jeopardy.
>
> Q. You didn't give him the opportunity to report it, did you?

A. No I did not.

Q. Did you ever read the Burlington Company employee handbook?

A. Yes, I did.

Q. Did you read in there that there was a companywide policy against sexual harassment?

A. Yes, I did.

Ellerth Dep. at 356-58. Ellerth attempts to distance herself from this testimony by stating in her affidavit: "While I knew there was a policy against sexual harassment in the employee handbook, I was not aware of whether it was being enforced, whether it was in effect throughout my employment, or who to complain to should I experience a problem with sexual harassment." We find this self-serving statement to be insufficient to raise a genuine issue of material fact. Burlington's employee handbook states in pertinent part:

> **Equal Opportunity**
>
> [T]he Company will not tolerate any form of sexual harassment in the workplace.
>
> . . . . .
>
> [I]f you have any questions or problems, or if you feel you have been discriminated against, you are encouraged to talk with your supervisor or human resources representative or use the grievance procedure promptly.

Def.'s Ex. F. Ellerth admits receiving a copy of the employee handbook and reading this policy statement. Ellerth Dep. at 358-60. If ever there was a time when she did not recall who to contact regarding the harassment she was enduring, she

need only have consulted her handbook. In view of Ellerth's acknowledgment of her deliberate failure to utilize the equal employment opportunity procedures outlined in the handbook, and her failure to take any other measures to notify appropriate Burlington management personnel about her harassment,[12] she has failed to raise a genuine issue of material fact as to whether Burlington knew or should have known about Slowik's conduct. Accordingly, she cannot rely on § 219(2)(b) as a basis for imposing liability on Burlington for Slowik's conduct.

Drawing on *Hunter v. Allis-Chalmers Corp., Engine Div.*, 797 F.2d 1417 (7th Cir.1986), Ellerth argues that she need not establish that Burlington had actual knowledge of

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[12] Ellerth states that she complained about Slowik's sexual harassment to Donna Thibideau, Burlington's customer service manager between January and March of 1994; Sherry Hester, a Burlington customer service representative; Brent Schneider, a Burlington sales representative; Patrick Crosson, a Burlington sales representative; Marilyn (last name unknown), a Burlington "sample" person; Laura Peffal, a Burlington customer service representative; and Cara Jiminez, a Burlington customer. (Pl.' Facts ¶ 46). However, Ellerth admits that none of these people were her superior, (Def.'s Facts ¶ 46), or a human resources officer in a position to file a formal complaint in accordance with Burlington's Employee Handbook grievance procedure. Ellerth completely failed to report Slowik's harassment to anyone who would have received the complaints within the scope of their authority or who would have had a duty to report Slowik's conduct. Ellerth also claims that Angelo Brenna witnessed the harassment at the New York lunch. However, even assuming for the sake of argument that Brenna's observations at that lunch would have sufficiently alerted him to the fact that Slowik was harassing Ellerth, we cannot conclude that he had a duty to report Slowik's conduct. Any knowledge that Brenna might have had cannot be imputed to Burlington, for he neither received the knowledge while acting within the scope of his authority nor witnessed anything that even remotely concerned matters within the scope of that authority. *See Juarez v. Ameritech Mobile Communications, Inc.*, 957 F.2d 317, 320 (7th Cir.1992).

Slowik's harassment because Slowik was a manager at the decision-making level of Burlington and his acts can therefore be imputed to Burlington. In relevant part, *Hunter* states:

> Since the acts of a corporation are acts of human beings, to say that the "corporation" has committed some wrong (rather than just that it is liable under the doctrine of respondeat superior for an employee's wrong) simply means that someone at the decision-making level in the corporate hierarchy has committed the wrong; the deliberate act of such a person is the corporation's deliberate act.

Id. at 1422. Notwithstanding the broad sweep of this language [which, we note, the Seventh Circuit has accurately described as *dicta*, *see Brooms v. Regal Tube Co.*, 881 F.2d 412, 420 (7th Cir.1989)[13], we do not believe that the language was intended to have the sweeping effect that Ellerth attributes to it. The language must be read in the context of the governing agency principles. The Seventh Circuit shed some light on this passage in *Shager v. Upjohn Co.*, which we quote at length because it is critically important to understanding the proper resolution of this issue:

> Discrimination is an intentional tort and as we noted earlier an employer is liable for the intentional torts of an employee only if they are in furtherance (though possibly misguided) of the employer's business, implying some relation between the tort and the business. . . . [A] supervisory employee who

[13] *See also Baskerville v. Culligan Int'l Co.*, 50 F.3d 428 (7th Cir.1995). In *Baskerville*, Judge Posner, who also authored *Hunter*, declined to decide whether it was correct to treat a supervisor as the employer (hence imposing strict liability on the employer) in cases involving "an abuse of authority, as where a supervisor threatens to fire a subordinate if she refuses to have sex with him." *Id.* at 431-32.

> fires a subordinate is doing the kind of thing that he is authorized to do and the wrongful intent with which he does it does not carry his behavior so far beyond the orbit of his responsibilities as to excuse the employer. Restatement (Second) of Agency § 228 (1958). From the outside, at least, it looks as if he is doing his job, which is not the case when one worker sexually harasses another; and the appearance of authority provides a rough-and-ready criterion of respondeat superior. . . .

913 F.2d 398, 405 (1990). For purposes of this discussion, the foregoing passage is significant because it establishes that *Hunter*'s language was intended to do little more than express the general principles of scope-of-employment liability and/or liability under the apparent authority doctrine. And, notwithstanding Judge Posner's statement that "the wrongful intent with which he does it does not carry his behavior so far beyond the orbit of his responsibilities as to excuse the employer," this Court believes, as we have endeavored above to illustrate, that an improper intent can indeed remove conduct from the scope of employment, *see* RESTATEMENT § 235 cmt. *a* and *c*. Moreover, as we stated above, we believe that the issue of whether conduct is within the scope of employment must be determined on a case by case basis with particular attention to the facts of each case. Notably, the example given by Judge Posner involved the firing of an employee *not* sexual harassment. We believe this distinction to be significant because there is likely to be a greater degree of overlap between the employer's purposes and the supervisor's discriminatory intent in the case of a discrete employment decision such as hiring and firing than in the case of creating a hostile work environment by soliciting sex from one's subordinates. What purpose of the employer is served by that conduct? None that we can discern.

Additionally, although the fact that a supervisor is doing the type of act that he is authorized to do, during working hours, and at an authorized place, gives rise to an inference that the employee is acting within the scope of his employment, RESTATEMENT § 235 cmt. *a*, that inference is rebuttable. *Id.* illustration 1. Where, as here, the supervisor's conduct is not tied to any specific employment decision and the employer has a published policy prohibiting sexual harassment, we must conclude that the inference has been rebutted. And, for reasons we discuss immediately below, we also find under the present facts, that Judge Posner's comments concerning apparent authority have no force here. Accordingly, we decline to impute Slowik's conduct to Burlington merely because he has some decision-making authority.[14]

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[14] Indeed, the actual extent of Slowik's decision-making authority is not open to much question. Burlington has submitted the affidavit of Slowik's superior, Salvatore V. Porio, executive vice president of Mattress Fabrics (or "Ticking"), who explains that Ticking is only one of five business units of the Burlington House Fabrics Group and the Group is only one of eight divisions of Burlington. Slowik is the vice president of Marketing and Sales for Ticking and reports to Porio. Porio states that he is "primarily responsible for the employment decisions affecting all employees in Ticking" and that he "approved the decision to hire and promote [Ellerth] and my signature is on the Personnel Change Form which memorializes both employment decisions." Porio Aff. ¶¶ 5, 6. Porio further states, "The position of Vice President of Marketing and Sales for Ticking held by Slowik is not considered an upper-level management position at Burlington. Further, Slowik is not amongst the decision-making or policy-making hierarchy of Burlington." *Id.* ¶ 8. On the other hand, Slowik testified in his deposition that he had ultimate decision-making authority regarding Ellerth's promotion. Slowik Dep. at 32. And Porio's affidavit does not conflict with this statement; after all, Porio merely states that he *approved the decision*. At most, Porio's affidavit merely raises issues about the degree of Slowik's authority which are not critical to the Court's resolution of this case.

The only remaining ground for imposing liability against Burlington for Slowik's conduct lies in § 219(2)(d), which subjects an employer to liability for the acts of its employees acting outside the scope of their employment where the employee "purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation." RESTATEMENT § 219(2)(d).

On its face, § 219(2)(d) appears quite applicable to the instant case. Slowik certainly invoked his apparent authority when he asserted that he could make Ellerth's life at Burlington very easy or very hard, and it was precisely the existence of the agency relationship that permitted Slowik the opportunity to exploit his position of authority and harass Ellerth. However, these readings of § 219(2)(d) are too shallow and fail to adequately take into account the policy rationales underlying the rule.

With respect to the language "was aided in accomplishing the tort by the existence of the agency relation," we concur with the D.C. Circuit which observed that "[i]n a sense, a supervisor is always 'aided in accomplishing the tort by the existence of the agency' because his responsibilities provide proximity to and regular contact with, the victim," and concluded that the reach of this language was intended to be much narrower. *Gary v. Long*, 59 F.3d at 1397. The comments to § 219 and § 261[15] confirm that a narrower reading was intended. For instance, comment *e* to § 219 notes, "Clause (d) includes primarily situations in which the principal's liability is based upon conduct which is

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[15] Section 261 provides: "A principal who puts a servant or other agent in a position which enables the agent, while apparently acting within his authority, to commit a fraud upon third persons is subject to liability to such third persons for the fraud." RESTATEMENT § 261.

within the apparent authority of a servant. . . . In other situations the servant may be able to cause harm because of his position as agent, as where a telegraph operator sends false messages purporting to come from third persons. See § 261." In turn, comment a to § 261 notes, "Liability is based upon the fact that the agent's position facilitates the consummation of the fraud, in that from the point of view of the third person the transaction seems regular on its face and the agent appears to be acting in the ordinary course of the business confided to him." Thus, the language appears to be intended to reach only conduct that on its face appears to be a natural and authorized incident of the agency. *See Gary*, 59 F.3d at 1397 (concluding that § 219(2)(d) "embraces a narrower concept that holds the employer liable only if the tort was accomplished by an instrumentality, or through conduct associated with the agency status") (internal quotation marks omitted).

Finally, notwithstanding Slowik's invocation of his apparent authority, we conclude that § 219(2)(d) still cannot support the imposition of liability on Burlington because Ellerth was fully aware that Slowik had exceeded the bounds of his authority. Section 166 of the Restatement provides: "A person with notice of a limitation of an agent's authority cannot subject the principal to liability upon a transaction with the agent if he should know that the agent is acting improperly." Comment *a* to this section further provides: "If a person has information which would lead a reasonable man to believe that the agent is violating the orders of the principal or that the principal would not wish the agent to act under the circumstances known to the agent, he cannot subject the principal to liability." *Cf.* RESTATEMENT § 165 ("A disclosed or partially disclosed principal is subject to liability upon a contract purported to be made on his account by an agent authorized to make it for the principal's benefit,

although the agent acts for his own or other improper purposes, *unless the other party has notice that the agent is not acting for the principal's benefit.*"); RESTATEMENT § 262 ("A person who would otherwise be liable to another for the misrepresentations of one apparently acting for him is not relieved from liability by the fact that the servant or other agent acts entirely for his own purposes, *unless the other has notice of this.*").

As the comment to § 262 explains, the rationale for imposing liability upon principals for acts that reasonably appear to fall within the scope of the agency is that: "A person relying upon the appearance of agency knows that the apparent agent is not authorized to act except for the benefit of the principal. This is something, however, which he cannot normally ascertain and something, therefore, for which it is rational to require the principal, rather than the other party, to bear the risk." RESTATEMENT § 262, cmt. *a*. Where, as here, an employer has published an explicit policy statement that prohibits sexual harassment, the employee has acknowledged receipt of the statement and has read the statement, and the employee is fully aware that her supervisor is engaging in unauthorized harassment, there is no sound reason in agency law or policy to require the employer to bear the risk of this conduct. To the contrary, under these circumstances, § 166 governs and forecloses the imposition of liability on the employer. *See Jansen*, 895 F.Supp. at 1066- 67; *see also Gary*, 59 F.3d at 1398 (finding that an employer's policy insulated it from liability and noting "[w]hile a supervisor might purport to act or speak on behalf of the employer, there can be no liability if the victim could not reasonably rely on the supervisor's representations."); *Bouton*, 29 F.3d at 109-10 (requiring the employee's belief in a supervisor's apparent authority to be reasonable and finding that an antidiscrimination policy known to employees

eradicates apparent authority). Accordingly, we conclude that § 219(2)(d) cannot support the imposition of liability on Burlington for Slowik's conduct.

One final issue with respect to Burlington's liability for Slowik's conduct, which we believe to be one of first impression, merits consideration. As this Court noted above, the hostile work environment to which Ellerth was subjected was created and maintained, in part, by Slowik's *quid pro quo* insinuations. *Quid pro quo* harassment, unlike hostile work environment harassment, has generally been treated as giving rise to strict liability on the part of the employer. *See, e.g., Kauffman v. Allied Signal, Inc.*, 970 F.2d 178, 185-86 (6th Cir.1992) ("Under a *quid pro quo* theory of sexual harassment, an employer is held strictly liable . . . under a theory of respondeat superior"); *Karibian v. Columbia Univ.*, 14 F.3d 773, 777 (2d Cir.1994) ("the law imposes strict liability on the employer for *quid pro quo* harassment"). Thus, we must consider whether the strict liability standard should apply in a case such as this where there is a *quid pro quo* component to the hostile work environment.

At the outset, we note that neither the doctrinal basis, nor the propriety, of applying strict liability in the context of *quid pro quo* harassment is entirely clear. Recently, in *Baskerville v. Culligan Int'l Co.*, the Seventh Circuit intimated that the propriety of the strict liability standard may be open to question when it remarked:

> An employer is not strictly liable for sexual harassment of one employee by another unless perhaps, the harassment takes the form . . . of an abuse of authority as where a supervisor threatens to fire a subordinate if she refuses to have sex with him. In such cases, a number of courts treat the supervisor as the employer . . . whether correctly or

> not we need not decide. (Neither the Supreme Court nor our court has had occasion to decide the question.) In all other cases, it is clear, the criterion for when an employer is liable for sexual harassment is negligence. . . .

50 F.3d 428, 431-32 (7th Cir.1995).

Indeed, there is no clear reason why the employer's liability in the context of *quid pro quo* harassment ought not to be determined by the same agency principles as those applied in the hostile work environment variant of harassment. When *quid pro quo* harassment is analyzed under the same principles outlined above, strict employer liability is not by any means compelled.

Several courts that have treated *quid pro quo* harassment as giving rise to strict employer liability have indicated that the liability is predicated on the fact that the supervisor's conduct is within the scope of the employment relation or apparent authority of the supervisor. A representative example is as follows:

> In a *quid pro quo* case, the corporate defendant is strictly liable for the supervisor's harassment. . . . This is logical. When a supervisor requires sexual favors as *quid pro quo* for job benefits, the supervisor, by definition, acts as the company.
>
> In such a case, the supervisor relies upon his apparent or actual authority to extort sexual consideration from an employee. . . . In that case, the supervisor uses the means furnished to him by the employer to accomplish the prohibited purpose. He acts within the scope of his actual or apparent authority to hire, fire, discipline, or promote.

Steele v. Offshore Shipbuilding, Inc., 867 F.2d 1311, 1316 (11th Cir.1989). *See also Bouton v. BMW of N. Am.*, 29 F.3d 103, 106-107 (3d Cir.1994) ("Scope-of-employment liability is often invoked in *quid pro quo* cases because the supervisor has used his authority over the employee's job to extort sexual favors. Without the agency relationship, *quid pro quo* harassment would be impossible, so the employer is responsible."); *Karibian*, 14 F.3d at 777 ("Because the *quid pro quo* harasser, by definition, wields the employer's authority to alter the terms and conditions of employment—either actually or apparently—the law imposes strict liability on the employer"). However, this view is difficult to sustain when the agency principles set out earlier in this opinion are applied in a similar fashion.

The Seventh Circuit has characterized *quid pro quo* harassment as "exactly the situation where a supervisor's only motivation is to have a conjugal relationship with the employee." *King v. Board of Regents of the Univ. Of Wisconsin Sys.*, 898 F.2d 533, 539 (7th Cir.1990); *see also Horn v. Duke Homes, Division of Windsor Mobile Homes, Inc.*, 755 F.2d 599, 604 (7th Cir.1985) (noting that imposing sexual consideration as a term of employment "serves no legitimate purpose of the employer"). In view of these characterizations, and applying the principles of Restatement § 219(1) outlined above, it would appear that *quid pro quo* harassment generally *would not* be found to fall within the scope of the supervisor's employment because it is not actuated by a purpose to serve the master. *See* RESTATEMENT § 228(2); *but see Horn*, 755 F.2d at 604 (applying respondeat superior liability notwithstanding the fact that the conduct

served no legitimate purpose of the employer).[16] Similarly, for the reasons discussed above, in a factual situation such as that presented by the instant case in which the harassed employee is well aware of the employer's policy prohibiting sexual harassment, that employee possesses facts that would give her reason to know that the supervisor's *quid pro quo* harassment is not within the scope of his authorized conduct and therefore the employee could not hold the employer liable under the principles of apparent authority embodied in Restatement § 219(2)(d). Thus, the negligence standard of § 219(2)(b) remains the only viable avenue under traditional agency principles for imposing liability on the employer under these facts even in the context of *quid pro quo* harassment.[17]

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[16] *Horn* predates *Meritor* and it is unclear whether the strict liability approach articulated in *Horn* survives *Meritor*. Perhaps because it predates *Meritor*, the *Horn* court did not discuss the supervisor's imposition of sexual consideration as a term of employment as *quid pro quo* harassment; rather it analyzed the case as one involving a disparate employment decision taken on the basis of sex—in fact, on several occasions the court indicated that different principles might apply in the sexual harassment context. However, subsequent Seventh Circuit cases, *see King v. Board of Regents of the Univ. Of Wisconsin Sys.*, 898 F.2d 533, 539 (7th Cir.1990), have referred to *Horn* as involving *quid pro quo* harassment. Significant to this discussion, we note that the *Horn* court may have recognized the doctrinal limitations of agency principles for supporting strict liability when it remarked, "whatever the result under the common law of agency, Title VII demands that employers be strictly liable for the discriminatory employment decisions of their supervisory personnel who are delegated the power to make such employment decisions." 755 F.2d at 605. We believe that *Meritor* leaves little room to apply anything but agency principles when evaluating employer liability in the sexual harassment context.

[17] Arguably, as noted in *Jansen*, 895 F.Supp. at 1064, there may be instances where it might be fair to impute knowledge of the harassment to the employer because the harassment is effectuated by one who is in "the upper echelons of management." In the instant case, Despite his title and

The foregoing remarks demonstrate that there appears to be doctrinal inconsistency in imposing strict liability on an employer in the context of *quid pro quo* harassment but not in hostile work environment harassment and, hence, that the propriety of the strict liability standard is open to some question. Perhaps that is why the Seventh Circuit flagged the issue in *Baskerville*. Of course, Ellerth does not purport to base her claim on a *quid pro quo* theory; thus, we will postpone deciding the question of whether the strict liability standard is sustainable until it is more squarely presented to the Court. Our segue into this question was occasioned, of course, because the narrower question actually before us—*viz*., whether to apply the *quid pro quo* standard in a hostile work environment context wherein the hostile environment was created, in part, by *quid pro quo* insinuations—is immaterial unless the *quid pro quo* standard is, in fact, different from the hostile work environment standard. However, under the facts of this case, we conclude that although the *quid pro quo* element of Ellerth's hostile environment is not insubstantial, the gravamen of her complaint is, by far, predicated on Slowik's persistent unwelcome comments of a sexual nature, his repeated comments about her body (including her breasts, legs and "ass"), his lecherous leering, and offensive touching. Accordingly, we believe that the negligence standard generally applicable to hostile environment harassment is more applicable to this case. To apply a *quid pro quo* standard under these facts would amount to the tail wagging the dog. Moreover, to apply a *quid pro quo* strict liability

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position as vice president of sales and marketing of the House Mattress Ticking division, the uncontroverted evidence indicates that Slowik cannot be considered to be at the upper echelons of Burlington's management. The affidavit submitted by Porio, indicates that . . . Accordingly, we are unwilling to conclude that Burlington had knowledge.

standard here merely because there is some element of *quid pro quo* harassment contributing to Ellerth's hostile environment strikes the court as manifestly unjust under the facts presented. It is undisputed that Burlington had a sexual harassment policy and a mechanism for addressing harassment in place. Ellerth was fully aware of the policy and consciously chose to disregard it. Under these facts, there is simply no just reason to impose strict liability on Burlington for the hostile environment created by Slowik.

For all of the foregoing reasons, under the facts presented by this case, we conclude that Burlington cannot be held liable for Slowik's conduct and is therefore entitled to judgment as a matter of law on Ellerth's Title VII claim.

Before moving on to consider Ellerth's second claim, the Court is impelled to make the following remarks concerning the unfortunate facts and outcome of this case. Needless to say, the facts of this case are unfortunate because no person should have to endure the objectification and humiliation that Ellerth was allegedly forced to endure at the hands of Slowik. They are also unfortunate, as with so many of these cases, because they strikingly illustrate that in spite of whatever social enlightenment our nation might have achieved in the wake of the civil rights movement, the various antidiscrimination laws enacted by Congress, and such consciousness raising events in our nation's history as the Anita Hill/Clarence Thomas hearings, the nation's workplaces are still filled with those who are all to eager to exploit their positions of authority and act motivated by discriminatory animus. And, they are also unfortunate because they so plainly demonstrate, by virtue of Ellerth's reluctance to come forward, the effects that systematic oppression has on its victims. The outcome is unfortunate in the sense that Slowik, if Ellerth's allegations are true, is able to walk away from this episode unscathed and Ellerth unable

to recover. We, like so many others, envisioned this outcome in *Jendusa v. Cancer Treatment Centers of Am., Inc.*, 868 F.Supp. 1006, 1013 n. 9 (1994), and now see the effect of the judicial determination that Title VII does not permit recovery against supervisors in their individual capacities. *See U.S. E.E.O.C. v. AIC Security Investigations, Ltd.*, 55 F.3d 1276 (7th Cir.1995). This Court cannot believe that this outcome was the one envisioned by Congress when enacting Title VII. *See Lynam v. Foot First Podiatry Centers, P.C.*, 886 F.Supp. 1443, 1446 (N.D.Ill.1995).

Constructive Discharge

Ellerth also contends that she was constructively discharged by Burlington as a result of Slowik's conduct. "An employer constructively discharges an employee only if it makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation." *Weihaupt v. American Med. Ass'n*, 874 F.2d 419, 426 (7th Cir.1989). As discussed at length above, Slowik's conduct cannot be imputed to Burlington and Burlington was not negligent in failing to respond to the harassment suffered by Ellerth. Ellerth never reported the harassment. Moreover, nothing in the record suggests that Burlington otherwise treated the plaintiff poorly, let alone intolerably. Burlington provided a grievance procedure for sexual harassment and Ellerth was apprised of Burlington's prohibition against sexual harassment. Ellerth adduced no evidence suggesting that had she properly complained about her harassment her complaints would have gone unheeded or would have been otherwise futile. Ellerth consciously chose not to use Burlington's grievance procedure; therefore, it can not be said that Burlington made Ellerth's working conditions intolerable forcing her into an involuntary resignation. Plainly, when an employer provides an avenue for relief from sexual harassment and an employee chooses to forego that

avenue, she cannot be heard to complain that she was constructively discharged by virtue of the harassment. Accordingly, Burlington is entitled to judgment as a matter of law as to Ellerth's constructive discharge claim.

CONCLUSION

Defendant Burlington Industries, Inc.'s motion for summary judgment in its favor is granted in its entirety. Judgment is hereby entered in favor of Burlington and against plaintiff Kimberly Ellerth. This action is dismissed with prejudice, both sides to bear their own costs.

(3)

No. 97-569

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1997

BURLINGTON INDUSTRIES, INC.,

Petitioner,

vs.

KIMBERLY B. ELLERTH,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the victim of "*quid pro quo*" sexual harassment under Title VII of the Civil Rights Act of 1964, as amended, November 21, 1991, 42 U.S.C. § 2000e, *et seq.*, must show that s/he either was forced to have sex with the harasser or was denied an economic job benefit/suffered an economic job detriment in order to recover; and

2. Whether non-economic injury is compensable in sexual harassment cases where the victim's supervisor, acting within the scope of his employment, apparent or delegated authority, has explicitly or implicitly conditioned an employment benefit or detriment on the performance of sexual favors.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, Alice Jansen and Packaging Corporation of America were parties before the Court of Appeals (No. 96-1361) due to consolidation of their case with the instant case for decision. The Equal Employment Opportunity Commission (EEOC) participated in the briefing and oral argument of this case as *amicus curiae*.

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Respondent, Kimberly B. Ellerth, respectfully requests that Burlington's petition for a writ of certiorari on the issue of "*quid pro quo*" sexual harassment be denied.

OPINIONS BELOW

The August 12, 1997 decision of the United States Court of Appeals for the Seventh Circuit, *en banc*, can be found at App. 1a-208a.[1] The November 27, 1996 three-judge panel opinion of the Seventh Circuit is located at App. 209a-239a. The January 19, 1996 opinion of the United States District Court for the Northern District of Illinois, Eastern Division, is located at App. 241a-287a.

STATEMENT OF JURISDICTION

The judgment of the *en banc* panel of the United States Court of Appeals for the Seventh Circuit was entered on August 12, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Title VII of the Civil Rights Act of 1964, as amended, November 21, 1991, 42 U.S.C. § 2000e-2(a)(1):

> It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of

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1. All references in this cross-petition to "App." followed by a number or numbers are intended to refer to a page or pages in the appendix to Burlington's petition for a writ of certiorari.

such individual's race, color, religion, sex or national origin.

STATEMENT OF THE CASE

Kimberly B. Ellerth ("Ellerth") brought this suit against Petitioner, Burlington Industries, Inc. ("Burlington"), in the United States District Court for the Northern District of Illinois, Eastern Division, alleging sexual harassment and constructive discharge under Title VII of the Civil Rights Act of 1964, as amended, November 21, 1991, 42 U.S.C. § 2000e *et seq.* ("Title VII"). The district court's jurisdiction over the case was under Title VII, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e *et seq.*. Federal question jurisdiction in the district court was under 28 U.S.C. § 1331, and pendant jurisdiction for the constructive discharge claim was under 28 U.S.C. § 1367(a).

In the *en banc* opinion below (consolidated with *Jansen v. Packaging Corp. of Am.* (95-3128) for decision), the Seventh Circuit, in a *per curiam* opinion, held that Ellerth had a viable claim of "*quid pro quo*" sexual harassment under a "scope of employment" or "delegated authority" analysis for which the employer was liable.

A. Response to Burlington's Statement of the Facts of the Case.

Respondent herein addresses those portions of Burlington's statement of fact which she perceives contain misstatements or require clarification:[2]

Regarding the position of Theodore Slowik ("Slowik") at

2. *See also* Ellerth's "Facts of the Case" portion to her Cross-Petition for a writ of certiorari.

Burlington and his authority over Ellerth, Slowik was Vice President of Sales and Marketing for Burlington's Mattress "Ticking" Division throughout Ellerth's employment. Prior to her promotion, Ellerth reported to Mary Strenk Fitzgerald, National Accounts Manager, who reported to Slowik. After her promotion, Ellerth reported to Patrick Lawrence ("Lawrence"), who reported to Slowik. Slowik testified that he had "ultimate decision-making power" regarding Ellerth's promotion. Slowik had the power to both hire and fire Ellerth, and indeed did interview and hire Ellerth for both of the positions which she held with the company. Ellerth was required to speak with Slowik by telephone about once per week. She also had contact with Slowik during her training trips and business conferences in New York; Greensboro, North Carolina; San Francisco, California; and when Slowik would travel to Chicago, Illinois. In addition, after Ellerth's promotion to territorial sales representative, Slowik was the sole person from whom she could obtain permission for special projects for her customers.

Ellerth did not complain "for the first time" about Slowik's sexual harassment against her three weeks after resigning. Ellerth complained to Donna Thibideau, Burlington's Customer Service Manager, about Slowik's sexual harassment between January and March, 1994. In addition, Angelo Brenna ("Brenna"), Burlington's Vice President of International Sales, was present with Ellerth at a business lunch wherein Slowik told "well over ten" offensive sexual jokes and grabbed Ellerth's knee under the table. As Ellerth walked back to the office a few feet ahead of Brenna and Slowik, Slowik stated, "[y]ou have got great legs, Kim. What do you think Angelo?" as Slowik stared at Ellerth's legs. Upon Ellerth's return to the New York office, she complained to Marilyn, "sample" person, and to Laura Peffal, Customer Service Representative, about Slowik and Brenna's behavior. During Ellerth's employment at Burlington, she also complained about Slowik's sexual harassment to Sherry

Hester, Customer Service Representative; Brent Schneider, Sales Representative; Patrick Crosson, Sales Representative; Cara Jimenez, a Burlington Customer; and to Slowik, himself. A sales representative named Dan was a witness to loud, obnoxious, sexually offensive and embarrassing comments by Slowik in front of Ellerth regarding a waitress' appearance. Another of Burlington's employees was present when Slowik stated to Ellerth, "On your knees again Kim," which Ellerth understood as a reference to fellatio, and found degrading and offensive. On May 31, 1994, Ellerth left a telephone answering-machine message with Patrick Lawrence ("Lawrence"), Ellerth's post-promotion direct supervisor, and sent him a resignation letter. Ellerth whited-out that portion of her resignation letter to Lawrence regarding the sexual harassment against her on the advice of her husband, which was telefaxed with blank spaces from the redaction.[3] About three weeks later, Ellerth sent a second letter to Lawrence, stating:

> Before I was hired, you and I spoke about the reasons why Ted [Slowik] didn't feel comfortable around me. I told you that he had said some sexually inappropriate things to me in the past. What I didn't tell you was that he had, on two occasions, patted my rear, and every time he saw me looked me up and down like a piece of meat. . . . My entire time at Burlington, I had to ignore Ted [Slowik] and try to do what I needed to do in my job.

In the summer of 1993, during the North Carolina training

3. That portion of the letter had read:

> What I did not want to mention to you was the fact that Ted [Slowik] had harassed me in the past and I simply ignored him to save my job. . . . Needless to say, these incidents could be seen as sexual harassment. . . . What a shame that one man can have such an influence.

trip, Ellerth accompanied Slowik to the hotel lounge after he had requested that she do so. After Slowik's sexual comments and staring regarding the female band members and Ellerth's breasts and legs, and as Ellerth was exiting the lounge, Slowik stated to her, "[y]ou know, Kim, I could make your life very hard or very easy at Burlington."[4] Ellerth understood this comment as clearly implying that she would have to engage in sexual relations with Slowik in order to succeed in the business. Slowik's implication that he could make life very hard or very easy, depending on whether Ellerth engaged in sexual relations with him, was clear to Ellerth given the totality of the circumstances up to that point, namely Slowik's prior inappropriate comments regarding Ellerth's appearance and her intimate marital relations, his staring at her breasts and legs, and his unwelcome and offensive touching of her knee.

In around March, 1994, the prior Midwest sales representative told Ellerth that Slowik was reluctant to promote her because she was "arrogant." Lawrence also told Ellerth that Slowik had made this statement. During Slowik's promotion interview of Ellerth in March, 1994, Slowik admitted to Ellerth that he had told other employees at Burlington (including her potential supervisor-to-be, Lawrence) that she was "arrogant" and told Ellerth that he had hesitations about promoting her. When Ellerth asked, "[i]s it because I'm not loose enough for

4. Although the district court ruled that pre-December 20, 1993 comments did not fall within the "continuing violation" doctrine, it was made clear that "this does not require that an 'iron curtain' be dropped on December 20, 1993, shielding from consideration all evidence of Slowik's conduct before that day . . .". (App. 261a.) The district court held that "the severity or pervasiveness of Slowik's conduct must be evaluated with reference to his prior conduct," and held that when the later instances of sexual harassment "are viewed in the context of Slowik's pre-December 20 conduct, it is clear to this Court that it cannot hold, as a matter of law, that Ellerth was not subject to a hostile work environment." (App. 263a.)

you, Ted?" Slowik responded in the affirmative. During this interview, Slowik reached over and rubbed Ellerth's knee again, and, when discussing travel associated with the new job, stated "[i]sn't your husband going to miss you?" Slowik later telephoned Ellerth and told her that she had been promoted despite his hesitations, and, in the same conversation, made a sexually inappropriate comment which caused Ellerth to cry.[5]

In approximately May, 1994, when Ellerth telephoned Slowik to obtain permission to perform a special project for a customer, Slowik responded, "I don't have time for you right now, Kim — unless you tell me what you are wearing." Ellerth said she had to go and hung up. Also in May, 1994, when Ellerth telephoned Slowik to again request his permission to do the same project, Slowik responded, "[a]re you wearing shorter skirts yet, Kim, because it would make your job a whole heck of a lot easier."[6]

Regarding the alleged complaints about Ellerth's work, Ellerth was not informed of any such complaints during the May, 1994 meeting between Ellerth and her new supervisor, Lawrence. On May 22, 1994, Lawrence sent Ellerth a letter regarding her non-return of telephone calls from two customers and three employees. The letter refers to a May 18, 1994 conversation with Ellerth, which Ellerth contends did not take place.

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5. While Burlington contended that Slowik had the power to "recommend" Ellerth for promotion, Ellerth contended and believed that Slowik had final decision-making responsibility regarding her promotion. Slowik himself testified that he had "ultimate decision-making power" regarding this promotion.

6. Ellerth was not granted permission by Slowik to perform the project. Although Burlington attempted to minimize this project in its petition for rehearing *en banc*, there is no evidence in the record regarding the precise nature of the project Ellerth was denied permission to perform.

As Burlington states, Ellerth did not succumb to Slowik's sexual demands by performing any sexual favors for Slowik, but she did "otherwise respond," as is illustrated by her reactions to those threats and her complaints to the Customer Service Manager and other employees at Burlington. Regarding Burlington's policy against sexual harassment, while Ellerth stated that she had read the Burlington Company employee handbook, she stated that she was not aware of whether it was being enforced, whether it was in effect throughout her employment, or who to complain to should she experience a problem with sexual harassment. Indeed, in response to her complaint to the Customer Service Manager, Ellerth was told that Ann Pillow may also have been sexually harassed by Slowik.

B. Procedural History

Burlington moved for summary judgment against Ellerth in the United States District Court for the Northern District of Illinois, Eastern Division, claiming that Burlington was not liable for the sexual harassment against Ellerth and that Ellerth was not constructively discharged. With regard to the *quid pro quo* sexual harassment,[7] the district court held that Ellerth, in labeling her allegation "sexual harassment" in her charge of discrimination, had failed to state a claim for "*quid pro quo*" sexual harassment. (App. 216a-217a, 219a-220a, 284a.) Viewing Ellerth's claim, instead, as a hostile work environment claim with a "*quid pro quo* component," the district court granted Burlington's summary judgment motion on the ground that agency principles did not impute liability to the employer for hostile work environment sexual harassment or for constructive discharge.[8] (App. 261a-265a, 283a-286a.) Regarding the *quid*

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7. *See* Ellerth's Cross-Petition for a writ of certiorari for discussion of Ellerth's "hostile work environment" claim.

8. Although the district court did not reach the *quid pro quo* sexual (Cont'd)

pro quo claim, the district court acknowledged that *quid pro quo* sexual harassment has "generally been treated as giving rise to strict liability," but stated that:

> although the *quid pro quo* element of Ellerth's hostile environment is not insubstantial, the gravamen of her complaint is, by far, predicated on Slowik's persistent unwelcome comments of a sexual nature, . . .[9]

(App. 280a, 284a.)

(Cont'd)
harassment claim, it posited that "there is authority to the effect" that Ellerth would have to prove that Slowik withheld "tangible employment benefits" in order to prove such a claim. (App. 264a, n.10.) The district court did not state, however, whether Slowik's withholding of permission to perform a project for a customer was a "tangible" job detriment, and did not analyze or distinguish those circuits holding that a showing of economic injury is not required in cases of "*quid pro quo*" sexual harassment. *See* Section I, B, *infra*; Civil Rights Act of 1991, 42 U.S.C. § 1981a(b).

9. In so holding, the district court acknowledged that

> it would not be unreasonable to conclude that every effort toward achievement that Ellerth made at Burlington was tainted by Slowik's threat, "I could make life very hard for you."

(App. 264a-265a.) The district court also stated that Slowik's statement during the March, 1994 promotional interview:

> could be regarded as reinforcing Slowik's previous persistent implicit messages to [Ellerth] that her value was as a sex object and that her growth in the company was dependent upon her sexual availability to him. So too could the jury find with respect to the April [sic] 1994 phone conversation[s] in which Ellerth called to request special permission. . . . Surely, a reasonable jury could find this comment tantamount to saying "I, as your supervisor[,] will have no time for you and will not assist you unless you talk dirty to me,". . .

(App. 263a.)

A three-judge panel of the Seventh Circuit (Bauer, Rovner and Wood, J.J.) reversed the district court, holding that no requirement existed that complainants plead particular sub-theories of sexual harassment at the time of their charge of discrimination, and holding that Burlington was liable for the sexual harassment[10] by Slowik under a "scope of authority" analysis. *See* Restatement (Second) of Agency, § 219(1) (1958).[11] (App. 219a-221a, 230a-231a.)

The Seventh Circuit thereafter granted Burlington's petition for rehearing *en banc*, and the three-judge panel decision was vacated. Nine of the twelve judges of the *en banc* panel of the Seventh Circuit affirmed the decision of the three-judge panel holding Burlington liable for the "*quid pro quo*" sexual harassment against Ellerth, under a "scope of employment" or "delegated authority" analysis.[12] (App. 6a-7a, 173a.) The majority of the of the *en banc* panel maintained the judicially-created distinction between "hostile work environment" and "*quid pro quo*" sexual harassment. (App. 6a-7a.)

The plurality opinion by Judge Flaum (joined by Cummings, Bauer, Cudahy,[13] Kanne (in part),[14] and Evans, J.J.) maintained the

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10. Both "hostile work environment" and "*quid pro quo*," although a distinction was not made in the three-judge panel opinion with regard to employer liability between these two "types" of sexual harassment.

11. All references herein to "Restatement," "§ 219(1)," "§ 219(2)(b)," "§ 219(2)(d)," and "§§ 228-230" are intended to refer to the Restatement (Second) of Agency (1958), or sections thereof.

12. The *en banc* Court did not limit it's review to the one *quid pro quo* statement cited by Burlington in its petition (p. 6, n.4), but reviewed all of Slowik's *quid pro quo* statements. (App. 27a, 200a-201a.) Ellerth's claim of constructive discharge, although plead, was not addressed as such by the *en banc* panel.

13. In 95-3128 (*Jansen*) only.

14. Judge Kanne's separate concurring opinion stated that a
(Cont'd)

distinction between *quid pro quo* and hostile environment sexual harassment and found Burlington liable for Slowik's *quid pro quo* sexual harassment against Ellerth under a "delegated authority" analysis.[15] (App. 12a-14a, 17a.) *See* Restatement, § 219(2)(d). The plurality opinion rejected the imposition of an economic benefit/detriment requirement in cases of *quid pro quo* sexual harassment, stating that

> a clear and serious *quid pro quo* threat alters the "terms and conditions" of employment in such a way as to violate Title VII and therefore can constitute an actionable claim even if the threat remains unfulfilled.

(App. 17a-19a.) This is true as "[a]n employee who does not submit [to the *quid pro quo* demand] may well undergo anxiety, distress, and loss of productivity regardless of whether the threat is carried out." (App. 19a.) The plurality opinion stated that many of the cases previously requiring an adverse job consequence in order for employer liability to attach in *quid pro quo* cases had been decided prior to the Civil Rights Act of 1991, 42 U.S.C. § 1981a(b), which now provides compensation for emotional damage. (App. 18a.)

The separate opinion of Judge Easterbrook (concurring in

(Cont'd)
negligence standard would adequately serve the deterrence goal of Title VII in both hostile work environment and *quid pro quo* sexual harassment cases. (App. 33a.) Judge Kanne noted that "the training, authority, and control given supervisors by an employer will . . . always enter the negligence equation." (App. 34a.)

15. The plurality also recognized that an employer may be held liable for *quid pro quo* sexual harassment where the threat exceeds the supervisor's actual authority, but the victim had a reasonable belief that the supervisor had the authority from the employer to carry out the threat, *i.e.*, "apparent authority." *See* Restatement, § 219(2)(d). (App. 19a-20a.)

part and dissenting in part), and the concurring and dissenting opinion of Judge Wood (joined by Easterbrook and Rovner, J.J.), did not draw any line separating different forms or types of sexual harassment, and stated that an employer could be held liable for sexual harassment under state law or under a "scope of authority" analysis. *See Green Hills Country Club v. Illinois Human Rights Comm'n*, 162 Ill. App. 3d 216, 113 Ill. Dec. 216, 514 N.E. 2d 1227 (5th Dist. 1987) (employers "strictly liable" in Illinois for both *quid pro quo* and hostile work environment sexual harassment by supervisory personnel); Rules of Decision Act, 28 U.S.C. § 1652; Restatement, § 219(1). (App. 143a-152a, 173a-176a, 184a-186a, 193a-195a.) Judge Easterbrook's separate concurring and dissenting opinion added that, although he did not distinguish between types of sexual harassment in reaching his conclusions, under the "hostile work environment"/"*quid pro quo*" paradigm adopted by the majority, he would hold the employer liable in Ellerth's case under a "hostile work environment" theory. (App. 146a, 151a-152a.)

Chief Judge Posner, in his concurring and dissenting opinion (joined by Judge Manion), maintained the distinction between the two types of sexual harassment and did not agree that Burlington should be held liable, stating that employers should only be liable for *quid pro quo* sexual harassment under a "delegated authority" analysis if there is a "company act," *i.e.*, economic job detriment. (App. 52a-55a.) Chief Judge Posner stated that the requirement of a "company act" has "at least a footing" in the case law, although "[i]t is, for sure, not the orthodox approach." (App. 52a.) Judge Manion's concurring and dissenting opinion (joined by Chief Judge Posner) similarly stated that strict liability for *quid pro quo* sexual harassment should be limited to situations where the plaintiff suffered a "tangible [economic] job detriment," *i.e.*, "adverse employment action." (App. 158a-160a.) Judge Coffey's concurrence and dissent rejected "strict liability" for all cases of *quid pro quo*

sexual harassment, with or without economic loss, applying a negligence theory to both hostile work environment and *quid pro quo* cases. (App. 7a.)

REASONS FOR DENYING THE WRIT

I.

THE PETITION SHOULD BE DENIED BECAUSE THE CIRCUITS ARE NOT CONFLICTED REGARDING THE STANDARD FOR EMPLOYER LIABILITY FOR *QUID PRO QUO* SEXUAL HARASSMENT, NOR DOES A CONFLICT EXIST REGARDING WHETHER NON-ECONOMIC INJURY IS COMPENSABLE UNDER TITLE VII.

A. The Circuits Uniformly have Held Employers Liable for "*Quid Pro Quo*" Sexual Harassment under Title VII.

As explored by Judge Manion in his separate opinion, at least eight other circuits, in addition to the Seventh Circuit, have either expressly embraced what has been termed a "strict liability"[16] standard for "*quid pro quo*" sexual harassment, or commented that the other circuits uniformly impose employer liability in such cases. (App. 157a, n.2.) Adding a review of the Third, Eighth, and D.C. Circuits to this analysis, the total

16. In the vacated three-judge panel opinion (Bauer, Rovner and Wood, J.J.) and in the *en banc* panel separate opinion by Judge Wood (joined by Easterbrook and Rovner, J.J.) (endorsing the three-judge panel opinion) issue was taken with use of the term "strict liability," which was designed to refer to a tort rule which "encourage[s] people to exercise greater care when undertaking socially beneficial but abnormally hazardous activities." (App. 173a, 176a, n.2; 182a, 231a.) The result achieved by courts' application of the standard termed "strict liability" in "*quid pro quo*" cases "is, in fact, nearly identical to the result produced by properly applied agency principles." (App. 182a.)

comes to at least twelve circuits holding or acknowledging that employers are liable for "*quid pro quo*" sexual harassment.[17] *See also* 29 C.F.R. § 1604.11(c) (1993) (an employer "is responsible for its acts and those of its agents and supervisory employees . . . regardless of whether the specific acts complained of were authorized or even forbidden by the employer"); Restatement, §§ 219(1), 219(2)(d) and 230.

The Third Circuit, in *Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1997 U.S. App. LEXIS 17800, *21, n.9 (3d Cir. July 14, 1997), held that

> courts have unanimously held that an employer is strictly liable for *quid pro quo* sexual harassment by a supervisor having actual or apparent authority to carry out the threat or promise that is made to the victim.

See also Bouton v. BMW of North Am., Inc., 29 F.3d 103, 107 (3d Cir. 1994).

The Eleventh Circuit, in *Farley v. American Cast Iron Pipe Co.*, 115 F.3d 1548, 1552 (11th Cir. June 30, 1997), stated that "[s]trict liability obtains in a *quid pro quo* context" because the supervisor, "by definition, acts as the company." *See also Steele v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311, 1316 (11th Cir. 1989); *Henson v. City of Dundee*, 682 F.2d 897, 910 (11th Cir. 1982).

In *Torres v. Pisano*, 116 F.3d 625, 1997 U.S. LEXIS 12805,

17. In the instant case, the district court, as well, stated that *quid pro quo* sexual harassment "has generally been treated as giving rise to strict liability on the part of the employer." (App. 280a.) The three-judge panel decision similarly stated that employer liability for "*quid pro quo*" sexual harassment was the result reached by other circuits. (App. 231a.)

*18-19 (2d Cir. June 3, 1997), the Second Circuit stated that "liability for *quid pro quo* sexual harassment is always imputed to the employer." *See also Karibian v. Columbia Univ.*, 14 F.3d 773, 777 (2d Cir.), *cert. denied*, 512 U.S. 1213, 114 S. Ct. 2693, 129 L. Ed. 2d 824 (1994) ("because the *quid pro quo* harasser, by definition, wields the employer's authority to alter the terms and conditions of employment . . . the law imposes strict liability . . .").

The Tenth Circuit, in *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437, 1443 (10th Cir. May 8, 1997) (collecting cases), held that "[i]n cases involving *quid pro quo* harassment, courts routinely hold, with little or no discussion, that the employer is 'strictly liable' for the supervisor's wrongful conduct." This imposition of "strict liability" presumably rests on the fact that "the supervisor was acting within the scope of his actual or apparent authority when he committed the harassment." *Id.*

The Fifth Circuit stated that "[c]ourts have held an employer strictly liable for '*quid pro quo*' harassment." *Canutillo Indep. Sch. Dist. v. Leija*, 101 F.3d 393, 397 (5th Cir. 1996).

In *Martin v. Cavalier Hotel Corp.*, 48 F.3d 1343, 1351 n.3 (4th Cir. 1995), the Fourth Circuit stated that the defendant "recognizes that in *quid pro quo* sexual harassment cases an employer is automatically liable for its supervisor's conduct." The Ninth Circuit, in *Nichols v. Frank*, 42 F.3d 503, 513 (9th Cir. 1994) (collecting cases), held that because a "harasser is able to grant . . . job benefits or detriments only because he has actual or apparent authority to do so," "[o]nce *quid pro quo* sexual harassment has been established, the harasser's employer is, *ipso facto*, liable." *Citing* EEOC Policy Guidance on Current Issues of Sexual Harassment, 8 Fair Empl. Prac. Man. (BNA) 405:6681, at 6694 (Mar. 19, 1990) ("EEOC Policy Guidance").

The Sixth Circuit, in *Kauffman v. Allied Signal, Inc.*, 970 F.2d 178, 185-86 (6th Cir.), *cert. denied*, 506 U.S. 1041, 113 S. Ct. 831, 121 L. Ed. 2d 701 (1992), held that

> [u]nder a "*quid pro quo*" theory of sexual harassment, an employer is held strictly liable for the conduct of supervisory employees having authority over hiring, advancement, dismissal, and discipline, under a theory of *respondeat superior*.

See also Highlander v. K.F.C. Nat'l Management Co., 805 F.2d 644, 648 (6th Cir. 1986).

The First Circuit held that "an employer is strictly liable for the [*quid pro quo*] actions of its supervisors," in *Chamberlain v. 101 Realty, Inc.*, 915 F.2d 777, 785 (1st Cir. 1990). *See also Lipsett v. University of Puerto Rico*, 864 F.2d 881 (1st Cir. 1988).

The Eighth Circuit stated that "[m]any circuits have held that '*quid pro quo*' sexual harassment violates Title VII and that the employer is strictly liable." *Crimm v. Missouri Pacific R.R.*, 750 F.2d 703, 710 (8th Cir. 1984).

The D.C. Circuit, in *Bundy v. Jackson*, 641 F.2d 934, 943 (D.C. Cir. 1981), stated that "an employer is liable for discriminatory acts committed by supervisory personnel."

B. A Majority of Circuits which have Addressed the Issue of "*Quid Pro Quo*" Sexual Harassment have Held or Acknowledged that Title VII Does Not Require an Additional Showing of an Economic Adverse Job Action.

Following this Court's rulings in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986), and *Harris v. Forklift Sys., Inc.*, 114 S. Ct. 367, 370-71 (1993), a majority of circuits have

ruled or acknowledged that a showing of economic harm is not necessary for employer liability to attach in sexual harassment cases where a supervisor makes a threat conditioning job benefits or detriments on the performance of sexual favors. *See* EEOC Policy Guidance at 3277-78 (when a supervisor "has made *or threatened to make* a decision affecting the victim's employment . . . [the supervisor] has exercised authority delegated to him by his employer" and the employer is liable). (Emphasis added); concurring and dissenting opinion of Chief Judge Posner at App. 52a-53a (conceding that requirement of a "company act" not the "orthodox" approach, and "has the curse of novelty").

The Third Circuit, in *Robinson*, recently held that:

> a *quid pro quo* violation occurs at the time when an employee is told that his or her compensation, etc. is dependent upon submission to unwelcome sexual advances. At that point, the employee has been subjected to discrimination because of sex. . . . Whether the employee thereafter submits to or rebuffs the advances, a violation has nevertheless occurred.

120 F.3d 1286, 1997 U.S. App. LEXIS 17800 at *25.

The Ninth Circuit, in *Nichols*, 42 F.3d at 513-14, also held that

> a supervisor's intertwining of a request for the performance of sexual favors with a discussion of actual or potential job benefits or detriments in a single conversation constitutes *quid pro quo* sexual harassment.

Citing, 29 C.F.R. §§ 106.11(a)(1) and (2) (1993) ("EEOC Guidelines"); *Chamberlain*, 915 F.2d at 783; *Spencer v. Gen.*

Elec. Co., 894 F.2d 651, 658 (4th Cir. 1990); *Collins v. Baptist Memorial Geriatric Ctr.*, 937 F.2d 190, 196 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 989 (1992); *Highlander*, 805 F.2d at 648; and *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1414 (10th Cir. 1987). *See also Heyne v. Caruso*, 69 F.3d 1475, 1478 (9th Cir. 1995).

Overturning the district court's determination that economic loss was required in "*quid pro quo*" cases, the Second Circuit in *Karibian*, 14 F.3d at 778, held that "evidence of some job-related penalty" is not necessary for employer liability. A supervisor's *quid pro quo* demand is "equally unlawful under Title VII whether the employee submits or not" and whether or not it is carried out.[18] *Id.*

Several other circuits have similarly stated or held that *quid pro quo* sexual harassment has occurred when a threat is made which conditions a benefit or detriment on the performance of sexual favors. These circuits state that *an alternate* route to establishing liability for *quid pro quo* sexual harassment is where the victim can show that a economic job benefit was actually denied. Other circuits have similarly focused on whether the "employee's reaction" to the threat affected the terms and conditions of her employment, or on whether the supervisor has "threatened to make" a job benefit or detriment conditional upon the performance of sexual favors.

In *Cram v. Lamson Sessions Co.*, 49 F.3d 466 (8th Cir. 1995), *citing*, *Kauffman*, 970 F.2d at 186, the Eighth Circuit stated that a plaintiff must show that

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18. The Second Circuit expressly distinguished its decision in *Karibian* from its prior dicta in *Kotcher v. Rosa Sullivan Appliance Ctr., Inc.*, 957 F.2d 59 (2d Cir. 1992), and its prior holding in *Carerro v. New York City Hous. Auth.*, 890 F.2d 569, 579 (2d Cir. 1989), stating that *Carerro*'s reference to "adverse consequences" was "descriptive of the facts before the Court, [and did not] establish[ ] a *sine qua non* that employment decisions be 'adverse' in order to state a valid claim." *Karibian*, 14 F.3d at 778.

> her submission to the unwelcome advances was an express or implied condition for receiving job benefits *or* her refusal to submit resulted in a tangible job detriment.

(Emphasis added.)

The Fifth Circuit stated that *quid pro quo* harassment has occurred where a plaintiff's "reaction to the harassment" caused "a tangible adverse effect on the terms or conditions of her employment." *Ellert v. University of Texas, at Dallas*, 52 F.3d 543, 545 (5th Cir. 1995). "Tangible aspects of the terms and conditions of [the victim's] employment" was further defined as where the plaintiff's

> acceptance or rejection of the harassment [was] either an express or implied condition to the receipt of a benefit *or* the cause of a tangible adverse effect on the terms or conditions of her employment.

Id. (emphasis added.) *See also Collins*, 937 F.2d at 196 (*quid pro quo* harassment occurs when "job benefits [are] conditioned on the acceptance of the harassment").

The Sixth Circuit in *Highlander*, 805 F.2d at 648, stated that *quid pro quo* harassment occurred where

> submission to the unwelcome sexual advances of supervisory personnel [was] an express or implied condition for receiving job benefits *or* [where] the employee's refusal to submit to a supervisor's sexual demands resulted in a tangible job detriment.

(Emphasis added.) *See also Kauffman*, 970 F.2d at 187 (a tangible job detriment need not be economic, although a *de minimis* exception may exist for "temporary actions," such as

being assigned to a manual machine for one day, where "further remedial action is moot and no economic loss occurred"), *citing*, *Chamberlain*, 915 F.2d 783.

In *Chamberlain*, 915 F.2d at 783, 787, the First Circuit held that employer liability follows where the plaintiff's "reaction to [the supervisor's *quid pro quo*] advances affected tangible aspects of . . . her compensation, terms, conditions, or privileges of employment . . . ," and includes the situation where "a supervisor conditions the granting of an economic *or other* job benefit upon the receipt of sexual favors from a subordinate, *or* punishes that subordinate for refusing to comply." (Emphasis added.) *See also Lipsett*, 864 F.2d at 897-98.

In *Spencer*, 894 F.2d at 658, the Fourth Circuit stated that *quid pro quo* harassment is where "sexual consideration is demanded in exchange for job benefits." The Court further stated that *quid pro quo* includes the situation where "[t]he acceptance or rejection of the harassment must be an express or implied condition to the receipt of a job benefit." *Id.*

The Eleventh Circuit, in *Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554, 1559 (11th Cir. 1987), stated that by "making *or threatening to make* decisions affecting the employment status of his subordinates," a supervisor subjects the employer to strict liability. (Emphasis added.)

The Tenth Circuit's position with regard to an "economic loss" requirement in *quid pro quo* cases is less clear. In *Hicks*, 833 F.2d at 1413, the Tenth Circuit stated that "*[q]uid pro quo* harassment occurs when submission to sexual conduct is made a condition of concrete employment benefits." *Citing*, 29 C.F.R. § 1604.11(a)(1-2) (1986). The Tenth Circuit, however, focused on the actual denial of benefits in *Sauers v. Salt Lake County*, 1 F.3d 1122, 1127, where it stated that, in a *quid pro quo* case,

"[i]f the plaintiff can show that she suffered an economic injury from her supervisor's actions, the employer becomes strictly liable." In its most recent case on the issue, *Harrison*, 112 F.3d 1437, the Tenth Circuit again defined *quid pro quo* sexual harassment as occurring " 'where specific benefits of employment are conditioned on sexual demands' by the victim's supervisor."

The D.C. Circuit, in contrast, held that non-economic harm alone was not sufficient to sustain a claim for *quid pro quo* sexual harassment, for "to hold otherwise would be to impose liability on the employer without evidence that the supervisor had acted as its agent." *Gary v. Long*, 59 F.3d 1391, 1396 (D.C. Cir.), *cert. denied*, 116 S. Ct. 569 (1995).

II.

THE PETITION SHOULD BE DENIED BECAUSE THE OPINION BELOW ON THE ISSUE OF *QUID PRO QUO* SEXUAL HARASSMENT IS IN HARMONY WITH THIS COURT'S RULING IN *MERITOR*, AND WITH THE COMMON LAW OF AGENCY.

A. Employer Liability in Cases of "*Quid Pro Quo*" Sexual Harassment Follows This Court's Directive in *Meritor* to Look to "Agency Principles" to Determine Who Acts as an "Agent" under Title VII.

Title VII defines "employer" as "any agent of" an employer. 42 U.S.C. § 2000e(b). This Court, in *Meritor*, 477 U.S. at 72, declined, based on an incomplete factual record, to issue a definitive ruling on employer liability for sexual harassment by supervisors. Instead, this Court directed the lower courts to look to "agency principles for guidance" when supervisors are involved, noting that "absence of notice to an employer does

not necessarily insulate that employer from liability."[19] *Id.*, *citing*, *generally*, Restatement § 219-237.

Under § 219 of the Restatement, a supervisory employee with authority to hire, fire, discipline, assign tasks, promote, or control the workplace environment of a subordinate employee, can impute liability to his/her corporate employer for his/her sexual harassment of that subordinate employee under a "scope of authority," "apparent authority," or "delegated authority" analysis. Without these "abuse of authority" avenues for liability, employer liability could also be determined under a negligence theory.[20] (App. 206a.) *See* plurality opinion of Judge Flaum and

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19. Similar to Burlington's arguments in the instant case, the district court in *Vinson v. Taylor*, 23 FEP Cases (BNA) 37, 42 (D.D.C. 1980), also attempted to impose a notice requirement in supervisor sexual harassment cases. This Court, however, held that the district court erred in imposing a notice requirement, and that courts should instead look to agency principles. *Meritor*, 477 U.S. 57. In affirming and remanding the Appellate Court decision, *Vinson v. Taylor*, 753 F.2d 141 (D.C. Cir. 1985), this Court held that it was "wrong to entirely disregard agency principles." *Meritor*, 477 U.S. at 72-72. Although the Appellate Court had acknowledged the district court's finding that "there was no evidence as to [the alleged sexual harasser's] status in the bank," it had held that "a supervisor, *whether or not* he possesses the authority to hire, fire, or promote, is necessarily an 'agent' of his employer . . .". *Vinson*, 753 F.2d at 150 n.70; *Meritor*, 477 U.S. at 70 (emphasis added). In the instant case, it is undisputed that Slowik had supervisory authority over Ellerth, had authority over her to hire and fire (or at least to recommend these actions against her), had "ultimate decision-making power" regarding her promotion, and was the sole person from whom Ellerth could obtain permission for special customer projects. *See* Response to Burlington's Statement of the Facts of the Case, *supra*.

20. *See, e.g., Baskerville v. Culligan Intern. Co.*, 50 F.3d 428, 431 (7th Cir. 1995) (an exception to the "known or should have known" negligence standard is where the sexual harassment "takes the form . . .

(Cont'd)

concurring opinion of Judge Cudahy for "negligence with heightened duty of care" analysis.

Under § 219(1) of the Restatement, when a supervisory employee, acting within the scope of his authority, engages in sexual harassment, employer liability follows under the doctrine of *respondeat superior*. *See, e.g., Martin*, 48 F.3d at 1351 (the test is "whether the service itself in which the tortious act was done was within the ordinary course of such business or within the scope of such authority"). (App. 175a, 191a-195a, 223a-231a.) Whether the employee was acting "within the scope" of his authority could be determined under the applicable state law. (App. 175a, 143a-151a, 184a-186a, *citing, Green Hills*, 162 Ill. App. 3d 216, 113 Ill. Dec. 216, 514 N.E. 2d 1227; Rules of Decision Act, 28 U.S.C. § 1652.) The employer would also be

(Cont'd)
of an abuse of authority"). Ellerth was held to have waived negligence theory as a route for recovery by the majority of the *en banc* panel. (App. 6a; 174a, n.1.) Ellerth claims that this determination was made in error, as Ellerth plead all facts relevant to a negligence theory, and the sentence relied upon as constituting the waiver (Ellerth "in fact, *agrees* with Burlington that § 219(2)(b) does not apply to this case") was erroneously cited by the *en banc* opinion as appearing in Ellerth's answer to the petition for rehearing (with suggestion for rehearing *en banc*). (App. 28a, 59a, 214a, 199a-202a.) This "waiver" sentence appeared in Ellerth's reply to the original Appellant's Brief, was discussed at oral argument as "incorrect," and the facts supporting liability under a negligence theory were reiterated. The three-judge panel decision held that Ellerth had not waived negligence. (App. 174a; 174a, n.1; 206a-207a, 214a, 239a.) Thereafter, in her answer to the petition for rehearing *en banc*, Ellerth cited to negligence theory and delegated authority as providing avenues for employer liability under Title VII, while arguing that the three-judge panel decision (utilizing a scope of authority analysis) should not be overturned. In the *en banc* panel decision, Judges Wood, Easterbrook and Rovner stated that, "[i]f negligence were the standard for her 'hostile environment' claim, I would find that Ellerth is entitled to reach a jury on this theory." (App. 174a, 206a-207a.)

liable, under § 219(1), if s/he used his/her authority to hire, fire, discipline, assign tasks, promote or control the workplace environment in committing the sexual harassment. Restatement, §§ 228-230. (App. 175a, 191a-195a, 223a-231a.) *See Baskerville*, 50 F.3d at 431; *Saxton v. American Tel. and Tel. Co.*, 10 F.3d 526, 536 n.19 (7th Cir. 1993) ("of course, if someone in the employer's decision-making hierarchy engages in harassment . . . the acts of the managerial employee constitute the acts of the employer"); *Shager v. Upjohn Co.*, 913 F.2d 398, 405 (7th Cir. 1990) ("[t]he deliberate act of an employee acting within the scope of his authority is the act of the employer, for an employer, at least where it is a corporation, acts only through agents"); *Hunter v. Allis-Chalmers Corp., Engine Div.*, 797 F.2d 1417 (7th Cir. 1986) (post-*Meritor*, stating that to hold the corporation liable for sexual harassment "simply means that someone at the decision-making level in the corporate hierarchy has committed the wrong; the deliberate act of such a person is the corporation's deliberate act"). The Seventh Circuit similarly stated in *Horn v. Duke Homes, Div. of Windsor Mobile Homes*, (a pre-*Meritor* case), that:

> by delegating power to [the supervisor,] the "employer" and [the supervisor] essentially merged; as long as the tort complained of was caused by the exercise of this supervisory power, [the supervisor] should be deemed as acting within the scope of his employment, and the employer should be held liable for the tort.

755 F.2d 599, 605 (7th Cir. 1985). The analysis under § 219(1) does not impose "strict liability"[21] on employers, as an employer can contest the allegation that the supervisor was acting within the scope of his authority when s/he committed the sexual harassment. *See* Restatement, §§ 228-230. (App. 175a.) As such,

21. *See* n.16, *supra*.

it is consistent with *Meritor*'s holding that employer liability does not follow merely by proving the existence of a supervisory relationship. (App. 151a, 175a-176a; 176a, n.2.)

As an alternate or additional theory for determining employer liability under Title VII, § 219(2)(d) of the Restatement provides two avenues for imposition of this liability when the supervisor is acting outside the scope of his employment: apparent authority and delegated authority. Under a delegated authority analysis, if a supervisory employee abuses or "misapplies" the authority that was delegated to him/her by the employer, *i.e.*, "was aided in accomplishing the tort by the existence of the agency relation," the employer can be held liable. Restatement, § 219(2)(d)(cl.2). (App. 12a-14a, 51a, 194a-195a, 234a-238a.) *See, e.g., Nichols*, 42 F.3d at 513-14 (reasoning that "[a] harasser is able to grant [ ] job benefits or detriments only because he has actual or apparent authority to do so 'delegated to him by his employer' "); *Karibian*, 14 F.3d at 777 (observing that an employer is liable for *quid pro quo* sexual harassment "[b]ecause the *quid pro quo* harasser, by definition, wields the employer's authority to alter the terms and conditions of employment"). Under this second clause of § 219(2)(d), the supervisor is able to "misapply" the powers delegated to him by the employer because of "apparent authority." (App. 17a, 236a-237a.)

The "apparent authority" analysis of the first clause of § 219(2)(d) examines whether the victim had a "reasonable belief" that the supervisor was using actual authority delegated to him/her by the employer in committing the sexual harassment.[22] The employer would be liable in such cases

22. Both the three-judge panel held and the *en banc* panel found that the facts alleged in Ellerth did not implicate an "apparent authority" theory, as "[n]o one doubts that Slowik was a Vice President for Burlington, and thus that he was its agent in some respects." (App. 19a-20a, 63a, 236a.)

because of "manifestations" that made it reasonable for the victim to believe that the sexual harasser was acting within his/her actual authority. (App. 19a-20a, 63a, 175a, 235a-237a.) Liability under either of the § 219(2)(d) theories is not "strict", as an employer can negate liability by showing that the authority to hire, fire, discipline, assign tasks, promote, or control the workplace environment of the subordinate employee was not delegated to the supervisor by the employer, or the employee could not have believed that it was, due to the employer's manifestations to the contrary. (App. 175a, 237a.)

B. Under *Meritor*, and as Codified by The Civil Rights Act Of 1991, Non-Economic Harm is Compensable under Title VII.

As this Court stated in *Meritor*, 477 U.S. at 64-65,

> the language of Title VII is not limited to "economic" or "tangible" discrimination . . . [but instead] evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment.

In *Harris*, this Court further concluded that:

> Title VII comes into play before the harassing conduct leads to a nervous breakdown. A discriminatorily abusive work environment, even one that does not seriously affect employee's psychological well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers.

114 S. Ct. at 30-71. *See also* Civil Rights Act of 1991, 42 U.S.C.

§ 1981a(b) (providing compensation for emotional damage). Because the authority to threaten to use the power to hire, fire, discipline, assign tasks, promote, or control the workplace environment is within the scope of authority of the supervisory employee, or within the authority delegated to that employee, application of agency principles to the context of "*quid pro quo*" sexual harassment yields employer liability when such power has been abused. *See, e.g., Robinson*, 120 F.3d 1286, 1997 U.S. App. LEXIS 17800 at *25; *Nichols*, 42 F.3d at 513-14 (collecting cases); *Karibian*, 14 F.3d at 778; *Horn*, 755 F.2d at 604-05 (a pre-*Meritor* case, holding that *quid pro quo* harassment occurs the moment a supervisor conditions a job benefit on performing sexual favors).[23]

Application of common law agency principles to the instant context in consistent with the deterrent purposes of Title VII, as well. As stated by Judge Flaum, "[c]ompanies' efforts to deal with sexual harassment should be systematic and proactive, rather than discrete and reactive." (App. 15a-16a.) "Employer's are quite capable of monitoring a supervisor's actions affecting the work environment without engaging in Orwellian surveillance." (App. 180a.) Companies can "hire, train and promote employees with an eye toward preventing undesirable behavior," as well as implement grievance procedures and, on a case by case basis, discipline offending employees. (App. 15a.) The "costs of preventing future harassment essentially represent an investment in long-term freedom from liability." (App. 16a.)

As this Court recognized in *Meritor*, it is the law of agency that is best suited for use in determining whether an employer

23. *Knox v. State of Indiana*, 93 F.3d 1327, 1334 (7th Cir. 1996) (economic harm not required for relief under retaliation provisions of Title VII); *Smart v. Ball State Univ.*, 89 F.3d 437, 440-41 (7th Cir. 1996) (same); *Dunning v. Simmons Airlines, Inc.*, 62 F.3d 863, 868 (7th Cir. 1995) (same).

is liable for sexual harassment by a supervisory employee, no matter what the actions of the supervisory employee. (App. 186a.) By clarifying to employer's that they will be held liable under agency principles when their supervisory employees (within the scope of their authority, apparent authority, or by using the authority delegated to them by the employer) engage in sexual harassment, the deterrent power of Title VII will be increased, as employers improve the training and monitoring of their supervisory employees to whom they have entrusted such powers, and victims will be compensated when these supervisory powers are abused.

CONCLUSION

Accordingly, Respondent respectfully requests that Burlington's petition for a writ of certiorari be denied.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

BURLINGTON INDUSTRIES, INC.,

Petitioner,

v.

KIMBERLY B. ELLERTH,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Petitioner Burlington Industries, Inc. ("Burlington") respectfully submits its reply brief in support of its petition for a writ of certiorari to review the judgment and opinion of the United State of Appeals for the Seventh Circuit.

REASONS FOR GRANTING THE WRIT

I. THE AUTHORITIES CITED IN THE PETITION ESTABLISH THAT A CIRCUIT SPLIT EXISTS REGARDING THE ELEMENTS OF *QUID PRO QUO* SEXUAL HARASSMENT

In her brief in opposition to Burlington's Petition, respondent Kimberly B. Ellerth ("Ellerth") attempts to conceal the existence of a conflict among the circuit courts of appeal regarding whether a plaintiff proceeding under a *quid pro quo* theory of sexual harassment must establish that the harassment affected tangible aspects of her employment by mischaracterizing the holdings of the cases cited in Burlington's petition. Specifically, Ellerth incorrectly states that the First, Fourth, Fifth, Sixth, Eighth, Tenth and Eleventh Circuits have held that a plaintiff may state a claim for *quid pro quo* sex harassment merely by alleging that job benefits or detriments were conditioned upon submission to a supervisor's sexual advances. In fact, these circuits have required that the plaintiff also prove that she suffered tangible job-related detriments due to her refusal to submit to the advances. Consequently, these courts are in conflict with the Third and Ninth Circuits, as well as with the Seventh Circuit's holding in this case.

For instance, Ellerth cites Spencer v. General Elec. Co., 894 F.2d 651 (4th Cir. 1990), as holding that a claim of *quid pro quo* sexual harassment is stated whenever "sexual consideration is demanded in exchange for job benefits." (Opp.[1] at 19) Ellerth completely ignores that portion of Spencer which holds that the plaintiff must additionally prove that "[t]he employee's reaction to the harassment affected tangible aspects of the employee's compensation, terms, conditions or privileges of employment." 894 F.2d at 658. Moreover, the court in Spencer required the plaintiff to provide evidence that her refusal to submit to her supervisor's sexual advances caused her to be passed over for raises and promotions in order to make out a *prima facie* case of *quid pro quo* sexual harassment. Id. at 659.

Ellerth also erroneously cites Kauffman v. Allied Signal, Inc., 970 F.2d 178 (6th Cir.), cert. denied, 506 U.S. 1041 (1992) for the proposition that a plaintiff need show only that submission to a supervisor's unwelcome sexual advances is made a condition of receipt of job benefits in order to state a *quid pro quo* claim. (Opp. at 18) In fact, the Sixth Circuit in Kauffman held that the plaintiff's allegations that her supervisor assigned her to a broken piece of equipment because she refused to expose her breasts to him did not state a claim under a *quid pro quo* theory because she had not proven that the harassment affected tangible aspects of her employment. 970 F.2d at 187.

Ellerth's brief in opposition likewise misstates the holdings of Chamberlin v. 101 Realty, Inc., 915 F.2d 777 (1st Cir. 1990); Ellert v. University of Texas, at Dallas, 52

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[1] Citations to "Opp." herein shall refer to Ellerth's Brief in Opposition to Burlington's Petition for Certiorari.

F.3d 543 (5th Cir. 1995); Hicks v. Gates Rubber Co., 833 F.2d 1406 (10th Cir. 1987); and Sparks v. Pilot Freight Carriers, Inc., 830 F.2d 1554 (11th Cir. 1987). As discussed in Burlington's Petition, each of these cases expressly holds that proof that a supervisor's harassment affected tangible aspects of the plaintiff's employment is a essential element of a *quid pro quo* sexual harassment claim.

The holdings of these cases are inconsistent with Robinson v. City of Pittsburgh, 120 F.3d 1286 (3d Cir. 1997) and Nichols v. Frank, 42 F.3d 503 (9th Cir. 1994), each of which holds that *quid pro quo* harassment occurs whenever a supervisor conditions a job benefit or the absence of a job detriment upon an employee's acceptance of sexual advances, and are also inconsistent with the Seventh Circuit's holding in this case that a supervisor's unfulfilled *quid pro quo* threat can, standing alone, form the basis of a *quid pro quo* sexual harassment claim. As stated in Burlington's Petition, this Court should grant certiorari to resolve this split between the circuits.

II. APPLICATION OF A STRICT LIABILITY STANDARD IN *QUID PRO QUO* SEXUAL HARASSMENT CASES CONFLICTS WITH MERITOR

In Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986), this Court held that employers should not be held to a standard of "absolute liability" in Title VII sexual harassment cases and that lower court should look to "agency principles" to determine the proper standard of liability. Despite this edict, the Seventh Circuit and virtually all other circuit courts of appeal have held employers strictly liable for *quid pro quo* harassment perpetrated by their

supervisory employees.[2] Because application of a strict liability standard in this and other cases is contrary to this Court's holding in Meritor, this Court should grant certiorari in this case to correct this misapplication of the law.

Ellerth argues that no inconsistency exists between the Seventh Circuit's holding in this case and this Court's holding in Meritor because the standard of employer liability which the Court of Appeals adopted here is grounded not in strict liability, but in the agency principles embodied in the Restatement (2d) of Agency. This contention is simply not supportable. A majority of the Seventh Circuit's en banc panel explicitly rejected the Restatement as a source for determining employer liability in *quid pro quo* sexual harassment cases. (App.[3] 12a-14a; 40a-44a) Writing for a plurality of five justices, Judge Flaum declared:

> Section 228 [of the Restatement] appears to have little relevance in the sexual harassment setting. In my judgment, reliance on the Restatement in this instance is the type of formalism that does not get us far in practice. (App. 12a)

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[2] In her Brief in Opposition, Ellerth argues in part that the circuits are not in conflict regarding the standard of liability to be applied to *quid pro quo* sexual harassment. (Opp. at 12-15) Burlington has not contended that a conflict exists among the circuits on this issue, but rather that the strict liability standard adopted by the courts of appeal is in conflict with Meritor.

[3] Citations to "App." herein shall refer to the Appendix to Burlington's Petition for Certiorari.

Chief Judge Posner, in his concurring opinion joined by Judge Manion, criticized reliance on the Restatement to determine standards of employer liability even more sharply, stating:

> The judges and lawyers who insist that the Restatement of Agency is the Way are either disingenuous, wishing to conceal the true grounds of decision, or are in the grip of the formalist belief that difficult cases can be decided by teasing out the meaning of words in a text composed with other problems in mind, without need to examine the social policies that the law might be thought to be serving.
>
> * * *
>
> It is time that we threw away the crutch of the Restatement and, recognizing the differences between workplace sexual harassment and the actual subject matter of that antiquated screed, ask as an original matter . . . what the best regime of liability would be for these cases.

(App. at 43a)

The Seventh Circuit chose to apply a strict liability standard to *quid pro quo* sexual harassment cases not because that standard was dictated by the Restatement, but because the court determined that this standard would better serve Title VII's goal of deterrence than a negligence standard. (App. 14a-16a) The fact that other circuits may be basing their standards of employer liability on the Restatement, as Ellerth suggests, only underscores the need for this Court to grant Burlington's Petition in order to clarify the "agency principles" to which it referred in Meritor.

CONCLUSION

Petitioner Burlington Industries, Inc. respectfully requests that this Court grant its petition for a writ of certiorari to review the judgment and opinion of the Seventh Circuit Court of Appeals for the reasons stated above.

Respectfully submitted,

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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1997

BURLINGTON INDUSTRIES, INC.,
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KIMBERLY B. ELLERTH,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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15 pp

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

Pursuant to Rule 37.3 of the Rules of this Court, the Chamber of Commerce of the United States of America (the "Chamber") moves for leave to file the accompanying brief as *amicus curiae*.

The Chamber is the world's largest business federation. The Chamber represents an underlying membership of more than three million businesses and organizations of every size, in every sector and region. This case concerns the circumstances under which an employer may be held liable under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§ 2000e *et seq.*, for sexual harassment committed by a supervisor. Title VII covers virtually all employers with fifteen or more employees. 42 U.S.C. § 2000e(b). Accordingly, most of the Chamber's members are subject to Title VII and are potential defendants in sexual harassment cases.

An important function of the Chamber is to represent the interests of its members in litigation addressing issues of widespread concern to the American business community. Accordingly, the Chamber has participated as *amicus curiae* in several hundred cases before the Court. For example, the Chamber has filed briefs in *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986) — addressing the issue of employer liability for supervisory sexual harassment — as well as numerous other employment discrimination cases. *See, e.g., Walters v. Metropolitan Educ. Enters., Inc.*, 117 S. Ct. 660 (1997); *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996); *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352 (1995); *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994); *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993);

Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989); *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985).

On November 14, 1997, the Court granted certiorari in *Faragher v. City of Boca Raton*, No. 97-282, which presents the Court with an opportunity to resolve a conflict in the circuits regarding the circumstances under which an employer may be held liable for supervisory sexual harassment. In the accompanying proposed brief, the Chamber argues that the instant case may present the Court with a better vehicle for addressing that issue, and that this case presents an additional issue that independently warrants the Court's review. Accordingly, the Chamber urges the Court to grant certiorari in the instant case and, if appropriate, to consider it in tandem with *Faragher*.

Although Petitioner has consented to the Chamber's request for leave to file a brief in this case, Respondent has refused to consent. Accordingly, the Chamber moves for leave to file the accompanying brief *amicus curiae*.

Respectfully submitted,

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Dated: December 1, 1997

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42 U.S.C. § 2000e(b) 1

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Michael J. Phillips, *Employer Sexual Harassment Liability Under Agency Principle: A Second Look at Meritor Savings Bank, FSB v. Vinson*, 44 Vand. L. Rev. 1229 (1991) 5, 6

STATEMENT OF INTEREST OF AMICUS CURIAE

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation. The Chamber represents an underlying membership of more than three million businesses and organizations of every size, in every sector and region. An important function of the Chamber is to represent the interests of its members in the federal courts in cases addressing issues of widespread concern to the American business community.[1]

This case concerns the circumstances under which an employer may be held liable under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§ 2000e *et seq.*, for sexual harassment committed by a supervisor. Title VII covers virtually all employers with fifteen or more employees. 42 U.S.C. § 2000e(b). Accordingly, most of the Chamber's members are subject to Title VII and are potential defendants in sexual harassment cases.

In recent years, the courts of appeals have become deeply divided on the standards governing employer liability for supervisory sexual harassment. As a result, an employer that does business in more than one part of the country may be subject to different standards of care under Title VII depending on the circuit in which the employee files suit. In addition, the unsettled state of the law has increased the cost of sexual harassment litigation, and has frequently served as an impediment to early settlements of such cases.

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[1] Counsel for the Chamber authored this brief in its entirety. No person or entity, other than the Chamber, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

On November 14, 1997, the Court granted certiorari in *Faragher v. City of Boca Raton*, No. 97-282, which involves a similar issue. The Chamber will be seeking leave to file a brief *amicus curiae* in *Faragher*, to assist the Court in adjudicating the merits of that case. The instant case, however, may provide the Court with a better vehicle to resolve the conflict among the circuits. Accordingly, the Chamber files this brief to urge the Court to grant certiorari in the instant case and, if appropriate, to consider it in tandem with *Faragher*.

ARGUMENT

In *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986), the Court held that an employer may be liable under Title VII for supervisory sexual harassment. The Court cautioned, however, that an employer is not "always automatically liable." *Id.* at 72. The Court expressly "declined . . . to issue a definitive rule on employer liability," leaving it to the lower courts to develop a standard. *Id.* The Court stated that "Congress wanted courts to look to agency principles for guidance in this area," but that such principles "may not be transferable in all their particulars to Title VII." *Id.* Over the course of the past decade, although every court of appeals has addressed this issue, the courts have failed to develop a consensus on an appropriate standard for employer liability.

Burlington Industries, Inc. ("Burlington") presents two questions in its petition for a writ of certiorari. One question is whether an employer is strictly liable for quid pro quo sexual harassment. The other question is whether a supervisor's request for sexual favors, accompanied by a threat of job consequences that is never implemented, constitutes quid pro quo or hostile environment sexual harassment. The two questions are necessarily intertwined, because the distinction between quid pro quo and hostile environment sexual

harassment generally has relevance only insofar as the two types of harassment are associated with different standards for imposing liability on the employer.[2/] If it is not necessary to distinguish between these two types of claims, then the single issue presented by the petition is simply what standard should be applied to determine whether an employer is liable for supervisory sexual harassment.

The lower courts have drawn a distinction between the employer liability standards applicable to these two types of sexual harassment. *See, e.g., Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437 (10th Cir. 1997), *petition for cert. filed*, 66 U.S.L.W. 3137 (U.S. Aug. 6, 1997) (No. 97-232); *Canutillo Independent Sch. Dist. v. Leija*, 101 F.3d 393, 397 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 2434 (1997). In the instant case, the members of the Seventh Circuit could not agree whether there should be one standard for all sexual harassment claims, or whether there should be separate standards for quid pro quo harassment and hostile environment harassment. For example, Judge Easterbrook concluded that there should be only one standard because the statute does not dictate otherwise (Pet. App. 148a), while Judge Cudahy inferred from *Meritor* that, for purposes of evaluating employer liability, the two types of

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[2/]It is, of course, theoretically possible that a request for sexual favors accompanied by an unimplemented threat will stand alone, and will, therefore, not be actionable unless characterized as a quid pro quo claim. *See* Pet. App. 34a. In the instant case, however, as in the vast majority of cases, the alleged threat was merely one of many allegations of supervisory misbehavior. Thus, the characterization of the threat as quid pro quo rather than hostile environment sexual harassment will, in most cases, make a difference only if the standard for employer liability is different.

claims "might better be treated differently." (Pet. App. 29a.) And even those judges who agreed that there should be only one standard for all sexual harassment claims could not agree on what that standard should be. Judges Wood, Rovner and Easterbrook opined that employers should be strictly liable for *all* supervisory sexual harassment (Pet. App. 143a-148a, 174a-176a), while Judge Coffey argued strongly that Title VII is not in any respect a strict liability statute, and that imposing a strict liability standard, "in contrast with the more flexible and reasonable negligence standard, will preclude [courts] from accounting for `the circumstances of [each] particular case.'" (Pet. App. 63a (*quoting Meritor*, 477 U.S. at 73).)[3/]

If there is only one employer liability standard for all sexual harassment cases, then the *Faragher* case may provide the Court with an appropriate vehicle to determine that standard. *Faragher*, however, involves only hostile environment sexual harassment, while this case involves both hostile environment and quid pro quo harassment. Thus, this case will present the Court with an opportunity to address generally the question of employer liability in sexual harassment cases. In particular, the Court will have an opportunity to revisit its statement that courts should "look to agency principles for guidance in this area." *Meritor*, 477 U.S. at 72. The disarray among the courts of appeals stems in large part from their disagreement over the significance of that phrase. For example, in evaluating whether a university could be held liable for sexual harassment perpetrated by a

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[3/]In a cross-petition filed on November 10, 1997, Respondent Ellerth presented the question the Court has now agreed to hear in *Faragher* — the standard for employer liability in hostile environment sexual harassment cases.

supervisory physician, the United States Court of Appeals for the First Circuit stated:

> The gist of the Court's holding is not to be gleaned from strict adherence to agency principles, which, as the Court noted, were to be mere "guidance," but rather from its definitive refusal to find employers "always automatically liable."

Lipsett v. University of Puerto Rico, 864 F.2d 881, 900 (1st Cir. 1988) (citation omitted). Other courts, by contrast, have found it necessary to parse the language of the Restatement of Agency almost as if it were a statute — and those courts have reached conflicting results. *Compare Bouton v. BMW of N. Am., Inc.*, 29 F.3d 103, 106-07 (3d Cir. 1994) (under negligence principles derived from the Restatement, "prompt and effective action by the employer will relieve it of liability") *with Karibian v. Columbia Univ.*, 14 F.3d 773, 780 (2d Cir.) (under the Restatement, employer is strictly liable "if the supervisor uses his actual or apparent authority to further the harassment, or if he was otherwise aided in accomplishing the harassment by the existence of the agency relationship"), *cert. denied*, 512 U.S. 1213 (1994).[4/]

[4/]*See also* Michael J. Phillips, *Employer Sexual Harassment Liability Under Agency Principles: A Second Look at Meritor Savings Bank, FSB v. Vinson*, 44 Vand. L. Rev. 1229 (1991) (discussing the technical legal flaws in the lower courts' efforts to apply traditional agency principles to sexual harassment, and noting that agency principles generally do not provide a legitimate basis for distinguishing between quid pro quo and hostile environment sexual harassment).

The *en banc* court in the instant case, mirroring the division among the circuits, issued eight separate signed opinions advocating a wide variety of standards ranging from strict liability to negligence. (Pet. App. 8a-207a.) A majority of the judges concluded "that the standard for employer liability in cases of hostile-environment sexual harassment by a supervisory employee is negligence, not strict liability, and that liability for quid pro quo harassment is strict . . . ." (Pet. App. 7a.) In reaching that result, some of the judges focused heavily on the Restatement of Agency, while others found that approach unhelpful. Chief Judge Posner expressed a particularly strong opinion on this subject:

> The *Restatement* turns out to be hopelessly vague in its bearing on the issue of employers' liability for sexual harassment, being vaguely worded and addressed to other issues. So judges can in good faith reach opposite results when they seek guidance in the *Restatement* to employers' liability for sexual harassment by supervisory employees. . . .
>
> It is time that we threw away the crutch of the *Restatement* and, recognizing the differences between workplace sexual harassment and the actual subject matter of that antiquated screed, ask as an original matter — as I think the Supreme Court invited us to do in *Meritor* when it (under)stated that the common law of agency might not be fully transferable to sexual harassment — what the best regime of liability would be for these cases.

(Pet. App. 42a-43a.) *See also* Phillips, n.4, *supra* (arguing that the courts should abandon the use of agency principles in determining employer liability for sexual harassment).

In the instant case, the court below lamented its "inability to forge a majority position with regard to the proper standard for evaluating an employer's liability for sexual harassment by a supervisory employee," and indicated its hope that this Court "will bring order to the chaotic case law in this important field of practice." (Pet. App. 7a.) By granting certiorari in the *Faragher* case, the Court has recognized the importance of resolving the split in the circuits on the issue of employer liability. It appears that the amount in controversy in *Faragher*, however, is only one dollar, and that a ruling in that case could be akin to an advisory opinion.[5] *See, e.g., Kerrigan v. Boucher*, 450 F.2d 487 (2d Cir. 1971) (claim for nominal damages alone does not constitute a "case or controversy" under Article III of the Constitution). In the instant case, by contrast, there is no question that there is a live controversy and that the Court's ruling would "affect the rights of litigants in the case." *DeFunis v. Odegaard*, 416 U.S. 312, 316 (1974) (quoting *North Carolina v. Rice*, 404 U.S. 244, 246 (1971)). Thus, the instant case may be a better vehicle for addressing the issue of employer liability.

In addition, if the Court concludes that it is necessary to apply one standard of employer liability to hostile environment claims and another to quid pro claims, then it would also be

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[5] "The district court entered judgment for Faragher on her Title VII claim against the City, awarding her $1 in nominal damages." *Faragher v. City of Boca Raton*, 111 F.3d 1530, 1534 (11th Cir. 1997), *cert. granted*, No. 97-282 (U.S. Nov. 14, 1997). The Eleventh Circuit reversed, concluding that the City was not liable under Title VII. *Id.* at 1539. Thus, even if the Court were to reverse the Eleventh Circuit's decision, it appears that the effect would simply be to reinstate the district court's award of nominal damages.

helpful to provide the lower courts with guidance in defining these two terms. This issue is not presented in *Faragher*, because the plaintiff sought to recover only on a hostile environment theory.

The definition of quid pro quo harassment established by a majority of the Seventh Circuit in this case squarely conflicts with that of the District of Columbia Circuit. In *Gary v. Long*, 59 F.3d 1391 (D.C. Cir.), *cert. denied*, 116 S. Ct. 569 (1995), the plaintiff alleged that her supervisor "repeatedly threatened her with adverse job consequences if she did not submit to his sexual advances . . . ." *Id.* at 1396. Although she never submitted, the supervisor did not carry out the threat. *Id.* The D.C. Circuit held that "it takes more than saber rattling alone to impose quid pro quo liability on an employer; the supervisor must have wielded the authority entrusted to him to subject the victim to adverse job consequences as a result of her refusal to submit to unwelcome sexual advances." *Id.* At most, the court held, "a supervisor's mere threat or promise of job-related harm or benefits in exchange for sexual favors . . . may create or contribute to a hostile work environment." *Id.* In the instant case, by contrast, a majority of the *en banc* court held that "a clear and serious *quid pro quo* threat . . . can constitute an actionable claim even if the threat remains unfulfilled." (Pet. App. 17a.) For the reasons stated more fully in Burlington's petition, that issue also warrants plenary review by the Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: December 1, 1997

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In the Supreme Court of the United States

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JOINT APPENDIX

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PETITION FOR CERTIORARI FILED NOVEMBER 10, 1997
CERTIORARI GRANTED JANUARY 23, 1998

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U.S. District Court
Northern District of Illinois (Chicago)

CIVIL DOCKET FOR CASE #: 95-CV-839

Ellerth v. Burlington Ind. Inc. Filed: 02/09/95

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Demand: $0,000
Lead Docket: None

Jury demand: Plaintiff
Nature of Suit: 442
Jurisdiction: Federal Question

Cause: 42:2000 Job Discrimination (Sex)

KIMBERLY B ELLERTH
plaintiff

Ernest Thomas Rossiello
[COR LD NTC A]
Margaret Ann Zuleger
[COR]
Rossiello & Associates
300 West Washington St.
Suite 1004
Chicago, IL 60606
(312) 346-8920

v.

BURLINGTON INDUSTRIES, INC.
defendant

James J. Casey
[COR LD NTC A]
Jeffrey Jerome Ward
[COR]
Keck, Mahin & Cate
77 West Wacker Drive
Suite 4900
Chicago, IL 60601-1693
(312) 634-7700

Docket as of March 1, 1996 0:33 am

Proceedings include all events. TERMED APPEAL
1:95cv839 Ellerth v. Burlington Ind Inc GOTTSC

2/9/95	1	COMPLAINT; jury demand - Civil cover sheet - Appearance(s) of Margaret Ann Zuleger, Ernest Thomas Rossiello as attorney(s) for plaintiff with Rule 39 affidavits (original and 1 copy summons(es) issued.) (Documents: 1-1 through 1-5) (dj)
2/9/95	--	RECEIPT regarding payment of filing fee paid; on 2/9/95 in the amount of $120.00, receipt #449731. (dj)
2/9/95	2	CONTINGENCY FEE AGREEMENT (not in public case file) (dj)
2/13/95	3	RETURN OF SERVICE executed upon defendant Burlington Ind Inc on 2/10/95 (jmp) [Entry date 02/15/95]
2/24/95	5	ATTORNEY APPEARANCE for defendant Burlington Ind Inc by James J. Casey, Jeffrey Jerome Ward (Temporarily

		unavailable for docketing) (jmp) [Entry date 03/08/95] [Edit date 03/08/95]
2/24/95	6	RULE 39 Affidavit of James J. Casey (Temporarily unavailable for docketing) (jmp) [Entry date 03/08/95] [Edit date 03/08/95]
2/24/95	7	RULE 39 Affidavit of Jeffrey Jerome Ward (Temporarily unavailable for docketing) (jmp) [Entry date 03/08/95]
2/27/95	4	ANSWER to plaintiff's complaint by defendant Burlington Ind Inc (jmp) [Entry date 02/28/95]
3/10/95	8	AMENDMENT by plaintiff Kimberly B Ellerth to complaint [1-1] (Attachments) (jmp) [Entry date 03/14/95]
3/16/95	9	MINUTE ORDER of 3/16/95 by Hon. Ruben Castillo: Status hearing set for 04/24/95 at 9:30 a.m. Parties to file a joint status report by 04/19/95. Plaintiff to notify all other parties of the court's order. (See reverse of minute order).

		Mailed notice (jmp) [Entry date 03/17/95]
4/19/95	10	JOINT STATUS REPORT by plaintiff Kimberly B Ellerth, defendant Burlington Ind Inc (jmp) [Entry date 04/20/95]
4/24/95	--	SCHEDULE set on 4/24/95 by Hon. Ruben Castillo: Status hearing held and continued to June 19, 1995 at 9:30 a.m. Discovery cutoff set for July 24, 1995. Pretrial order to be filed by August 7, 1995. Mailed notice (ro)
6/19/95	—	SCHEDULE set on 6/19/95 by Hon. Ruben Castillo: Status hearing held and continued to 9/19/95 at 9:00 a.m. Discovery Ordered closed on 9/15/95. Plaintiff to disclose any expert witnesses pursuant to Rule 26(a)(2) by August 31, 1995. Defendant to disclose any expert witnesses pursuant to Rule 26(a)(2) by September 29, 1995. No notice (ro)
9/18/95	11	MOTION by defendant Burlington Ind Inc for summary judgment; Notice of motion (jmp) [Entry date 09/20/95]

9/18/95	12	MEMORANDUM OF LAW by defendant Burlington Ind Inc in support of motion for summary judgment [11-1] (jmp) [Entry date 09/20/95]
9/18/95	13	RULE 12 Statement of material facts as to which there are no genuine issues by defendant Burlington Ind Inc (jmp) [Entry date 09/20/95]
9/18/95	14	APPENDIX filed by defendant Burlington Ind Inc in support of motion for summary judgment [11-1] (Attachments) (Exhibits) (jmp) [Entry date 09/20/95]
9/19/95	15	MINUTE ORDER of 9/19/95 by Hon. Ruben Castillo: Status hearing held; continued to 9:00 11/13/95. Plaintiff's response to defendant's motion for summary judgment [11-1] due 10/19/95. Defendant's reply to answer brief due 11/02/95. Motion for summary judgment [11-1] will be taken under advisement and the court will rule by mail. Mailed notice (jmp) [Entry date 09/20/95] [Edit date 02/28/96]

10/19/95	16	RESPONSE by plaintiff Kimberly B Ellerth to defendant's Rule 12((M) statement of material facts (jmp) [Entry date 10/20/95]
10/19/95	17	ANSWER BRIEF by plaintiff Kimberly B Ellerth in opposition to defendant's motion for summary judgment [11-1] (jmp) [Entry date 10/20/95]
10/19/95	18	APPENDIX filed by plaintiff Kimberly B Ellerth regarding answer to motion for summary judgment [17-1] (Exhibits) (jmp) [Entry date 10/20/95]
10/20/95	19	MOTION by plaintiff Kimberly B Ellerth for leave to file answer brief in excess of 15 pages instanter; Notice of motion (jmp) [Entry date 10/23/95]
10/20/95	20	MINUTE ORDER of 10/20/95 by Hon. Ruben Castillo: Plaintiff's motion for leave to file answer brief in excess of 15 pages instanter [19-1] is granted. Telephoned notice (jmp) [Entry date 10/23/95]

11/3/95	21	MOTION by defendant Burlington Ind Inc for leave to file reply brief in excess of 15 pages instanter; Notice of motion (jmp) [Entry date 11/06/95]
11/3/95	22	REPLY BRIEF by defendant Burlington Ind Inc in support of its motion for summary judgment [11-1] (jmp) [Entry date 11/06/95]
11/3/95	23	AFFIDAVIT of Salvatore V. Porio regarding motion for summary judgment [11-1] (Attachments) (imp) [Entry date 11/06/95]
11/3/95	24	MINUTE ORDER of 11/3/95 by Hon. Ruben Castillo: Defendant's motion for leave to file reply brief in excess of 15 pages [21-1], instanter [21-2] is granted. Telephoned notice (imp) [Entry date 11/06/95]
1/18/96	25	MEMORANDUM, OPINION, AND ORDER (jmp) [Entry date 01/19/96]
1/18/96	26	MINUTE ORDER of 1/18/96 by Hon. Ruben Castillo: Enter memorandum opinion and

		order. Defendant's motion for summary judgment [11-1] is granted in its entirety. Judgment is entered in favor of the defendant and against the plaintiff Kimberly Ellerth. This action is dismissed with prejudice, both sides to bear their own costs. Terminating case Mailed notice (jmp) [Entry date 01/19/96]
1/18/96	27	ENTERED JUDGMENT (imp) [Entry date 01/19/96]
2/15/96	28	NOTICE OF APPEAL by plaintiff from judgment entered [27-1], from motion minute order [26-2] and from order [25-1] ($105.00 PAID) (df) [Entry date 02/16/96]
2/15/96	29	DOCKETING STATEMENT by plaintiff regarding appeal [28-1]. (df) [Entry date 02/16/96]
2/16/96	--	TRANSMITTED to the 7th Circuit the short record on appeal [28]. Mailed notice to all counsel. (df)
2/20/96	30	ACKNOWLEDGEMENT of receipt of short record on

		appeal USCA 96-1361 (ip) [Entry date 02/21/96]
2/23/96	31	SEVENTH CIRCUIT transcript information sheet by plaintiff Kimberly B Ellerth (jmp) [Entry date 02/26/96]
2/29/96	--	TRANSMITTED to the 7th Circuit the long record on appeal no. 96-1361 consisting of one volume of pleadings and two volumes of loose pleadings. Mailed notice to all counsel. (df)

[END OF DOCKET: 1:95cv839]

Dear Pat,

The first thing I want to make clear to you is that you were absolutely right in hiring me. I have the intelligence, the drive and the enthusiasm to do anything I want. Allow me to tell you how I see the chain of events leading up to this.

I was hired by Betsy expecting to learn and grow from her. Betsy certainly knows her accounts, but it was difficult for her to give responsibility away. The only skills I gained from her were construction of fabric and who's who in the mattress world. I should have ended my career with the company there. When I learned of Patrick's resignation, I truly felt that this would be a great opportunity for me. It would have been, had Burlington treated me as the new person, Kim, instead of holding me up to Patrick for comparison. Please do not deny this because it is true. I am only speaking of the way Burlington treated me and not customers. They are in a class by themselves. To start it all off with, I heard that Ted called me arrogant. I know this is true.

To hear what he had to say about me was not surprising considering what had occurred in the past.

I know that Ted must have made your decision terribly difficult for you to make.

I started my job knowing full well, that Ted did not approve.

That was unsettling to begin with. The second mistake that Burlington made was waiting too long to hire me. Patrick had given six weeks notice of his departure. During the last two weeks, I was subjected to a crash course without files and

computer. The first week, let me remind you that we were all in San Francisco. This week, I simply learned what some of my customers looked like. The following week, Patrick and I were flying non-stop to meet more customers that I hadn't at ISPA. In between these flights, Patrick had to give me crash courses on what he had been doing for the last three years. Also Patrick had started his new job and was trying to waylay Jeffrey and train me. He did not have his mind completely on Burlington. Then he was gone. The computer was missing and so were the files that went along with it. I started the week of the truck strike, Burlington was tight on high-sley and were having problems with filling colors. On top of all that, I had to inform numerous customers that what they were currently running was going to be a drop. They were not aware of this until I told them in mid-April. At the sane time, I was trying to go on what I had, deal with Rosella, who clearly did not have the patience to tell me what she needed, nor was she happy about Patrick's absence. Meanwhile, I was spinning my wheels trying to gain ground. My new customers were understandably concerned with a new person and did not believe me when I would explain why we were delinquent on the high sley product that contained a filling color that was in demand. Naturally, they did not have faith in me. I do not blame them a bit. Then there were the customers who outwardly admitted that they did not believe a woman could handle this job and were testing me to the limits, and this is not including the people who are just difficult to handle. My lap top finally arrives after three and a half weeks on the job. My samples are not complete and many need replacing because they are dirty. There was a lot to handle.

Pat, you then come out to visit me. If you remember, we only had one day in the office and we didn't even review

anything. We were too busy on the phones. It was at this time that you told me that there was a learning curve and I should give myself 6 months to learn. That would have been great, had Burlington given me a chance to learn while supporting me and giving me a helping hand when I started to drown. Instead, more water was put on my head to help my drowning along, Pat, you also told me that I would have to do things my way in order to get comfortable. The customers would have adapted, people are animals, we adapt. It would have taken a simple call on your part to acknowledge these changes and phoned our customers to assure them that everything would be fine. That you were there to help me, and would be watching. They would have adapted. During our lunch at John's Garage you reviewed all of my weaknesses so far. I can accept that, but Pat, you forgot one important ingredient for a successful employee: PRAISE. There were many things that I was doing well. These were never covered. How is that for morale?

Meanwhile, back on the ranch. The natives were getting restless. They were even nit picking on things like, "Kim was calling me on Monday, instead of Friday" even though they did not ship until Wed. Little did I know that this person did not deal with suppliers on any other day than Friday. WOW, what a crisis. By, the way, did anyone mention that I did not place their orders as requested? I did everything in my power to make everyone happy.

Also, during this time, Patrick was calling a few customers just to say "Hi". That is more than fine since he had such good rapport win them. But this was not helping my rapport with them. There were certainly a few others that were whining about insignificant things.

I then went out with Dee who helped me greatly in organizing and she also discovered a few items that I was not aware of or were confused on. Such as many of my customers assumed they were on a release basis, when they should not have been and a few other items as such.

I also resented the fact that I was being covered up by you. You were saying that I did not have any sales experience. First, I had 8 mo. outside sales and many years of retail. We must not forget that Patrick had none. It was not my selling skills that should have been looked at, it was my training on systems. You also must not forget that up to this point I had exactly two weeks of training and that is being generous. Two weeks training and, BOOM, into a 5 million dollar territory you go.

I am not above criticism by any means, I did do a few things that any new person will do. In some instances, a few old salesman as well. What I was lacking, was training, support and understanding. Burlington only has Burlington to blame.

A few salespeople agreed that they could not see why I was being "picked on" so terribly. It was like a new kid on a playground with no parents to supervise.

I have taken a standing offer from a well known company. I will be trained extensively before being placed in a position. This is good to know. I would hate to go into anything with limited knowledge again.

Pat, I also think that you should look at the job performance memo you sent me. 1. No Praise 2. Being compared to Patrick 3. No support in the face of customers. Stroke 'em then Smack 'em. I believe this is what they recommend for

managers. Remember, even Patrick was new at one point and made mistakes. Please do not make this mistake again.

I will be receiving one more bill from the business line and the cellular line. I cut both lines off the day I quit. I would appreciate it if this expense report would be expedited along with the one in this folder. I have also enclosed my calling card and the travel card. I will be holding on to your laptop until I get my last expense check. This is for my own safety.

I wish you luck in the future.

Sincerely

/s/ Kimberly B. Ellerth

Kim Ellerth

Dear Pat, June 21, 1994

There is one more situation regarding my job that I think you need to be aware of. In my letter of resignation I explained why I had quit. You need to know the real reason. I briefly mentioned it in my letter, but I did not get into it because I was afraid to. Before I was hired, you and I spoke about the reasons why Ted didn't feel comfortable around me. I told you that he had said and done some sexually inappropriate things to me in the past. What I didn't tell you was that he had on two occasions patted my rear and everytime he saw me looked me up and down like a piece of meat. On my first trip to N.C. to train, Ted, Dan, his wife and I went out to dinner. When Dan dropped Ted and I off at the hotel, Ted invited me into the Fifth Season to watch the show. I went, but was very upset because he kept making sexual comments about the women on the stage. We got up to leave and as we were walking out, he patted my rear and said he could make my life at Burlington very easy, or very hard. I told him he wasn't acting very appropriately and he just laughed at me and walked away. Naturally, Ted was drinking as usual. There were several other occasions after that one that I continued to ignore. This is why Ted "couldn't put his finger" on why he did not want me to have the job.

I don't expect you to do anything about this because as I had been told before. Ted is just Ted. My entire time at Burlington, I had to ignore Ted and try to do what I needed to do in my job. But I finally had it when I spoke to Ted on the phone during my last weeks and he said to me, "This job must be hard for a woman like you." I replied, "like what?" He then said, "An attractive woman with great legs; you should wear shorter skirts" Ted made my life with Burlington unbearable.

I just thought you should know, although I'm sure you are not surprised.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

KIMBERLY B. ELLERTH, Plaintiff,	)	
vs.	)	No. 95 C 0839
BURLINGTON INDUSTRIES, INC., Defendant.	)	

The deposition of KIMBERLY B. ELLERTH, called by the Defendant, for examination pursuant to notice and pursuant to the Federal Rules of Civil Procedure for the United States District Courts pertaining to the taking of depositions, taken before TERESA VOLPENTESTA, Certified Shorthand Reporter and Notary Public within and for the County of Cook and State of Illinois at 77 West Wacker Drive, Suite 4900, Chicago, Illinois, on the 3rd day of May, A.D., 1995.

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for a little bit.
He asked me if I were married and
I said yes, I was, and he said, "Are you planning on

having a family," and I said -- knew that question was not appropriate but I said "No, we are not, because I was afraid that I would not be offered the position, and then he asked me if I were practicing to have a family.

* * *

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Q And then he asked you if you were married?

A Yes, sir.

Q And you said you were obviously?

A Uh-huh.

Q And then you said he asked you if you were planning on having a family?

A Correct.

Q Okay. Now, you said you knew that that was inappropriate?

A Correct.

Q Okay. Tell me what you mean by that.

A Because if I am not mistaken, it's - that is not -- a possible employer is not supposed to ask questions of marital status and a few other things that I can't recall at this moment, so I knew

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that that was not an appropriate question to ask.

Q Did you take offense at that?

A Yes, I did.

Q Did you say anything to him?

A No, I did not.

Q Okay.

A I was vying for a position.

Q What do you mean vying for a position?.

A I was hoping to get this position.

Q When you worked at Burlington, did you ever ask anyone if they were planning on having a family?

A I don't recall that I did.

Q Pardon?

A I don't recall that I did.

Q Well, when you say you don't recall if you did, are you suggesting that you may have but you don't remember it or that you don't think you did?

A I don't think I did.

Q Pardon?

A I don't think I did.
Q Because it would be inappropriate?

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A That's right.
Q Okay. Now, the next thing you said he said was he asked you if you were practicing to have a family?
A Yes.
Q What did you take that to mean?
A I took that to mean that if -- that we were -- if we were making love.
Q You and your husband?
A Yes.
Q How did you respond? What did you say?
A I didn't say anything at that moment. I didn't respond.
Q Okay. What -- all right. He said -- he asked you that question and you did not respond?
A That's correct.
Q What did he then next say?
A I don't recall what he said next. He paused for a moment, waited for my response.

Q And there was none?
A And there was none.
Q Okay. Did you maintain eye contact with him at that point?

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A No, I did not.
Q And I take it you took great offense at that question?
A Yes, I did.
Q Did you say anything to him?
A I was very humiliated but I did not say anything.
Q Okay. What was the next thing that was said? At this point it sounds somewhat awkward.
A I don't recall what was said next. I was so taken aback and so upset with the questioning that I don't recall.

* * *

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Q What do you mean they weren't work-related?
A They would be an off-colored joke. Most of the time they were off-colored jokes,

offensive jokes.

Q Okay. Now, would you just be standing there and he would walk up and tell you an off-colored joke? Is that what you are saying?

A I don't recall the situation surrounding it.

Q Well, there was more than one, was there not?

A Yes, there was.

Q Okay. So do you recall the circumstances surrounding any of them?

A During these brief discussions, they were in the office, brief jokes were in the office.

* * *

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Q More than four?

A Around four.

Q Around four. Okay. Now, did any of them occur during these two long meetings?

A Yes, they did.

Q Okay. Both long meetings?

A There was one during the long -- first long meeting and then several during the second long

meeting.

Q Several jokes in the second long meeting?

A Correct.

* * *

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Q There was no business purpose?

A No, there was not.

Q Okay. And an off-colored joke was told during it or was there more than one?

A Several.

Q How did they come up, if you recall?

A I was not involved in most of the conversations. It was Angelo and Ted telling jokes back and forth.

Q To each other?

A Yes.

Q And you were just sitting there?

A Correct.

Q Did they talk about anything else or did they just tell jokes to each other?

A I don't recall the conversation being anything more than just a good time for them.

Q Pardon?
A I don't recall anything else being said during that meeting.
Q How long were you at lunch with them?
A Approximately over an hour.
Q Okay. And were people drinking?
A Yes, they were.

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Q Were you drinking?
A No, I was not.
Q Who was drinking?
A Both Mr. Slowik and Angelo.
Q Okay. And do you recall what they were drinking?
A No, I do not.
Q Do you recall how many drinks they had?
A They had at least two apiece.
Q Did they appear to be intoxicated?
A Yes, they did.
Q Both of them?
A Yes.
Q Now, did you go to the restaurant with them or did you meet them there?

A We walked together.
Q All three of you?
A Yes.
Q Did they appear to be intoxicated on the way to the restaurant?
A No.
Q Did they have more than two drinks apiece?
A I suspect Ted may have had one more

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past the two.
Q He may have had three?
A Correct.
Q Is that right?
A Correct.
Q And Angelo only had two?
A That is what I recall.
Q Okay. And did they both appear to be intoxicated?
A Correct.
Q And how did that evidence itself to you?
A They were very loud. The jokes got

more offensive. Ted became red in the face, loud and obnoxious.

Q Okay. How long after you were in the restaurant did they start to become loud and obnoxious?

A Approximately 15 minutes.

Q Okay. After one drink?

A Approximately.

Q What do you mean, "approximately?"

A I don't know when they drank or at what time they did.

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Q Is there anything else on that?

A No.

Q Okay. Now, were these jokes of a sexual nature?

A Yes, they were.

Q Okay. Were they both telling them?

A I remember only Ted, although Angelo may have as well.

Q You specifically recall Ted?

A Correct.

Q Okay. How many of these jokes were

told?

A Well over ten.

Q Okay. When you say, "well over ten," what do you mean?

A I don't recall exactly how many but they were frequent and constant.

* * *

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Q Okay. Now, other than the loud and obnoxious offensive jokes, did anything else occur at that lunch?

A At one point during lunch, during one of the jokes, Ted reached over and rubbed my knee.

* * *

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Q Okay. And it was during one of the jokes that he reached over and rubbed your knee?

A That is correct.

Q Okay. Now, you were sitting between he and Angelo but you were sitting in a circle; is that right?

A Correct.

Q And Angelo would have been on one side

of you and Ted would have been on the other side of you?

A Correct.

Q And what did you do when he rubbed your knee?

A I pulled it away.

Q Pulled your knee away?

A Correct.

Q Did you say anything to him?

A No, I did not.

Q Did Angelo see him rub your knee?

A No, he did not.

Q It was under the table?

A Correct.

Q How do you know Angelo didn't see it?

A I don't know if Angelo -- I would

[p. 77]

assume that he didn't.

Q Now, did he only do that once?

A Correct.

Q Okay. How long into the lunch and into this series of jokes did he do this?

A Before the first hour was up.

Q Okay. And then you stayed for another half hour, 45 minutes after that?

A Approximately.

Q Okay. Where the joke telling got more raucous as time went on; is that right or wrong?

A It was consistent.

Q Okay. And when you pulled your leg away from him, you didn't say anything?

A No, I did not.

Q Did anything else occur at that lunch that you recall other than joke telling, and the inappropriate joke telling -- I assume you thought was inappropriate?

A Correct.

Q And his attempt to rub your knee. Did anything else occur during that lunch?

A No. The offensive joke telling and the knee rubbing was all that occurred during lunch.

* * *

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Q What do you recall specifically Ted saying?

A Nice legs. It was something cruder

than that.
Q I need to know as best you recall what it is he said.
A "You have got great legs, Kim. What do you think, Angelo?"
Q Is that as accurate a recollection as you have?
A Yes, it is.
Q Okay. What did Angelo say when he asked him that question?
A I don't recall exactly what Angelo said.
Q Did he say anything?
A I believe he did.
Q But you don't recall what it was?
A I don't recall.

* * *

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Q Okay. And now I asked you was he gaping or staring in any inappropriate way when he said that?
A When I turned back after the response, yes, he was staring at my legs.

Q When he said that, I take it you weren't looking at him; is that right?
A No, I was not.
Q And you turned around after he said it?
A Correct.
Q What happened then?
A I turned around and kept walking.
Q Okay. And were Ted and Angelo still telling each other jokes?
A Correct.

* * *

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the
Answers to the Interrogatories indicate that during the interview, No. 3 on Page 3, "During the interview, Slowik stared at Plaintiff in a sexual way which made Plaintiff feel very uncomfortable."
A Correct.
Q Can you describe what it is you mean when you said that?
Can you describe what you are talking about?
A There were times where he -- his

eyesight -- his eyes would move down to my chest
area for prolonged periods of time.
Q While he was talking or -
A Correct.

* * *

Did he say anything inappropriate
while he was doing that?
A I don't recall.
Q Okay. So you are saying he may have
said something inappropriate while he was doing

[p. 86]

that?
A Yes.
Q But you don't recall?
A I don't recall.
Q When you say, "for prolonged periods of
time," what do you mean?
A More than the average length of a
glance.
Q Okay. No. 4 on Page 3 says, "Also
during the interview," now this is the initial job
interview, "Slowik stared at Plaintiff's breasts and
legs."

A Correct.

* * *

[p. 87]

Q Were you sitting directly across from
him?
A Yes, I was.
Q Okay. Can you describe how he stared
at your legs?
A During the interview, I had my legs
crossed and they were out to the side, and during
the conversation he stared at my legs.
Q When you say, "off to the side," do you
mean off to the side of the table?
A Correct.
Q Now, was this -- were these separate
stares or were they just kind of -
A Just constant.
Q During the whole interview?
A Correct.

* * *

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Q Okay. Now, when you say he was loud
and obnoxious then, what do you mean?

A Loud conversation and joking with Dan and his wife.
Q Okay. What do you mean when you say, "joking with Dan and his wife?"
A They were just having fun.
Q Okay. Now, was Ted obnoxious?
A Yes.
Q In what fashion was Ted obnoxious?
A Very loud. He was giving the waitress a hard time.
Q What kind of a hard time was he giving the waitress?
A I don't recall exactly how he was giving her a hard time. It was not regarding the service.
Q It was what?
A Not regarding the service.
Q It was not regarding service?
A No.
Q Okay. What was it regarding?

* * *

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A I believe it was regarding her.

Q Okay. What do you mean by that?
A I don't recall exactly. I just remember thinking it was very inappropriate and offensive.
Q Okay. Was he making fun of -- was he giving her a hard time in a sexual way? Was he making offensive sexual comments to her?
A I don't recall.
Q Okay. What specifically do you recall about the conversation regarding the waitress?
A I just remember that he was giving her a very hard time, something regarding her personal self, not the restaurant.
Q Okay. But you don't remembe what it was?
A No, I don't.
Q Okay. Did it have to do with her appearance?
A Probably.
Q Now, when you say, "probably," I don't understand that.
A Well, that's what I would find offensive.

* * *

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Q Can you tell me what happened when you got back to the hotel?

A Ted invited me into the Fifth Season which is the bar of the Four Seasons Hotel.

Q That's the name of the bar?

A The Fifth Season.

Q Okay. And did you go in there?

A Yes, we did.

Q Okay. And was there entertainment in there?

A Yes, there was.

Q Okay. And what was the nature of the entertainment

A It was an all-women band.

Q What kind of bank, rock'n'roll band or dixieland band or what?

A No, it was a rock'n'roll band.

* * *

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tell me what transpired there, if anything inappropriate or offensive in any way?

A He was making comments about the women on stage. He was saying what nice breasts they had, what nice legs they had, aren't they nice, skimpy outfits.

Regarding the breasts, he turned to me and said, "You are a little lacking in that area, aren't you, Kim?"

Q And what did you say?

A I ignored it.

* * *

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Q What did you say?

A I was very tired, I was very humiliated and offended and I decided it was time to leave.

Q Okay. And so you just stood up and -

A Correct.

Q Did he stay in the bar when you left?

A No, he did not.

Q He left with you?

A Correct.

* * *

MR. CASEY: Q On the Answers to Interrogatories on Page 4, No. 9, it says, "In

Greensboro, North Carolina at the Four Seasons Hotel, in or around the summer of 1993 while Plaintiff was in Greensboro visiting the factories for training, Slowik told Plaintiff that she should 'loosen up' more." Do you recall that?

A Yes.

Q Now, where did that happen?

A That happened in the Fifth Season.

Q During this all-women band incident?

A Correct.

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Q Okay. And was -- can you tell me the context in how that came up?

A During his joking and offensive - sexually offensive remarks, and I didn't say anything and he told me that I should loosen up.

Q Okay. Now, what joking and sexually offensive comments are you talking about?

A About the women's breasts and about mine and about their outfits.

Q Okay. Now, in addition to that, was he also telling jokes?

A No, he was not.

Q Okay. So that when you say joking and offensive comments, that's what you are talking about?

A Correct, correct.

Q Okay. What do you mean by joking?

A Poking fun at the women.

Q Okay. About their physical attributes?

A Correct.

Q Okay. And somewhere in there he said to you, "you ought to loosen up?"

A Correct.

Q Can you describe any more specifically

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the context of that?

A During his inappropriate sexually offensive comments, he just kept saying it and I just sat there and I didn't say anything.

Q Okay. Now, No. 10 on Page 4 of the Answers to Interrogatories, it says, "In Greensboro, North Carolina at the Four Seasons Hotel in and around the summer of 1993 while Plaintiff was in Greensboro visiting the factories for training, Slowik told Plaintiff that he could make her job

'very hard' or 'very easy' for Plaintiff."

A That's correct.

Q Okay. Now, the next one says, No. 11 on Page 4 says, "In Greensboro, North Carolina at the Four Seasons in and around the summer of 1993 while Plaintiff was in Greensboro visiting the factories for training, after dinner Slowik told Plaintiff that he could make her job very hard or very easy for Plaintiff."

Is that the same thing or did he do it two different times?

A No, it was once.

Q It was once. okay. So these two paragraphs are describing the same thing?

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A Correct.

Q Okay. Now, was that in the lounge?

A That was outside of the Fifth Season.

Q Before you went in or after you came out?

A After we came out.

Q Okay. So this is after you decided you were going to bed?

A Correct.

Q And going to your room. And he was walking out with you?

A Correct.

Q And it was after he had told you you ought to loosen up?

A Correct.

Q What did he say?

A As we were walking out, he stopped in the lobby and turned to me and said, "You know, Kim, I could make your life very hard or very easy at Burlington."

Q And what did you say?

A I didn't say anything.

Q Did he say anything else?

A No, he did not.

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Q He just turned around and walked away?

A Correct.

Q Did he touch you in any way, shape or form at that time?

A No, he did not.

Q Pardon?

A No, he did not.
Q He just said that and walked away?
A Correct.
Q Now, No. 12 on Page 4 says, "In Greensboro, North Carolina at the Four Seasons Hotel in and around the summer of 1993 while Plaintiff was in Greensboro visiting the factories for training, after dinner Slowik stared at Plaintiff in a sexual way which made Plaintiff very uncomfortable."
Can you describe what you are talking about there?
A In the same manner as the interviews, prolonged locks at my breasts and legs.

* * *

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Was he talking about, you know, her breasts and her legs and things like that to her.
A I don't recall exactly what it was but it was something not waitress-related.
Q Can you be more specific? I mean, I understand it's not waitress-related.
A Unfortunately, I cannot be more

specific than that because I don't recall exactly what was said.
Q Do you think that if it was an offensive sexual nature you would recall it?
A I recall that I was very offended with what he said to the waitress, and I know the only way that I would be offended or embarrassed is if there was a situation where he was talking sexually offensive.
Q And you were offended and embarrassed?
A Yes, I was.
Q Okay. So then without remembering exactly what he said, is it fair to conclude that those were sexually offensive comments made directed at the waitress?

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A Yes.
Q Did Dan or Dan's wife say anything at that time?
A No, they did not.
Q They were sitting at the table with you?
A Correct.

Q And if it was loud enough for other people in the restaurant to have heard, it would have been loud enough for them to hear?
A Yes.
Q Okay. Okay. Let's go back to the - giving you all these little short names, the Angelo lunch in New York.
A Yes.
Q Can you tell me the nature of some of the jokes that were being -- what was said with as much specificity as you can?
A They were very sexually offensive. They were joking about breasts, sex acts, along those lines.
Q Okay. But I am going to ask you to be as specific as you can, because when you say sexually offensive, I mean, that's kind of a

[p. 119]

conclusion in your mind. I need to know exactly what it was they said if you can recall and the beat you can recall.
A I don't recall the jokes word-for-word.

I don't -
Q To the best of your recollection.
A To the best of my recollection, they were sexually offensive. They were discussing sex acts in various joking -- in various jokes.
Q Can you recall any one specific joke that anyone told at that table?
A No.
Q Not one?
A I don't remember jokes like that.

* * *

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Q Were they brief conversations?
A Yes, they were.
Q He would ask a question and you would answer it?
A Correct.
Q Okay. Would he tell any of these vulgar jokes on the phone during that time?
A No, but there were sexual innuendoes on the phone, all phone conversations.
Q All phone conversations?
A (Indicating.)

Q Pardon?
A All phone conversations.
Q Now, you got to tell me what you mean there were sexual connotations in all phone conversations. What did he say?
A There are so many.
Q I am sure -- I don't know, but tell me what they were.
A "How are those legs of yours, Kim; ha, ha, ha."
I mean, it just upset me and humiliated me so much it's so difficult to remember

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these little times.
Q When you say "little times," what do you mean?
A The little short conversations that I would hold with him.
Q Okay. Do you recall any specifically other than how are your legs, Kim?
A I know there was one more joke about practicing having a family.
Q There was a joke about that?

A A phone. "How is your husband? Fine. Are you still -- are you practicing having a family?"
Q And what would you say or what did you say?
A I never responded.
Q You never responded at all?
A No.
Q Ever?
A Not during those phone conversations.

* * *

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Q Tell me, Ms. Ellerth, about the incident in the fall you just referred to. What happened?
A We were preparing -- I was preparing

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for a meeting.
Q With whom?
A Just me. I was doing it in the sample room. I was preparing in the sample room by myself.
Q Okay. In that -- you were preparing for a meeting with whom?

A I don't remember what client it was.
Q But it was a client you were preparing for, not an in-house meeting?
A Correct.
Q Okay.
A And I was getting samples out. There were always a lot of samples and I was down on the floor folding samples.
Q Fabrics?
A Fabrics, and Ted walked in with Laura Peffal. They had just come in from a flight and they walked past the door -
Q She works in New York?
A Yes, she does.
Q Okay.
A And they walked in, he passed the sample room and said -
Q Did he come into the sample room?

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A No, he did not.
Q Okay.
A And he remarked, "On your knees again, Kim" and kept walking.

Q Okay. Was that the entire incident?
A That incident, yes.

* * *

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Q All right. What happened?
A He was in for another meeting and he was using my office to make his phone calls, and as I walked in he made a comment like, "It's nice to have my butt where your butt was, Kim."
Q Okay. I take it he was sitting in your chair?
A Correct.
Q Is that what he was referring to?
A Correct.
Q Do you recall when that was? Can you place it around any other event that you can more accurately tell us?
A He was in for a meeting, fall of 1993.
Q Okay. Around the time of this "on your knees again, Kim" comment?
A Correct.

* * *

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Q From St. Patrick's Day -- from the St. Patrick's Day initial job interview through this time period in the fall of '93, did you ever say anything to Ted Slowik about things he was saying to you?

A I know that I had enough guts to say it was inappropriate one time.

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Q When was that?

A I don't recall.

Q What was the incident?

A I don't recall that either.

Q Where was it?

A I don't recall.

Q What did you say?

A I said I thought that whatever he was saying was inappropriate.

Q But you don't know what it was?

A No, I do not.

Q You don't know when or where?

A I just remember I had enough guts to finally say something to him.

Q Was anyone else present when you said it?

A No, they were not.

Q You remember that, though?

A Yes, I do.

Q And you don't know if you were in your office?

A I cannot recall.

Q Was it on the phone?

A I cannot recall.

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Q Do you remember anything about the context of it?

A It was always a sexual innuendo or a comment.

Q Not always. About the time you said I think it's inappropriate, that specific time?

A A sexual innuendo.

Q Do you remember that?

A Because -- any time that he said something to me it was always a sexual innuendo that was embarrassing and humiliating, and I finally had enough guts to tell him that it was inappropriate.

Q And you don't remember what it was?
A No, I don't.
Q Let me ask you this: Is there any time he talked to you that he didn't make a sexual innuendo, any time?
A I can't recall.
Q You can't recall if he ever had a conversation without a sexual innuendo?
A He upset me so much every time he called that I don't remember having a conversation without him saying something to me.

* * *

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Q Well, tell me about the party. What happened?
A There was -- it was at Morton 's. Customers were there, drinks were being served. My husband was there, spouses were invited, and during the evening, he came up to my husband, patted him on the shoulder and said, "You are a lucky man to have a woman like that," referring to me.

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Q Okay.

A Excuse me. I need a tissue.
Q Sure. Were you there when that was said?
A No, I was not.
Q When were you told about that comment?
A After the holiday party.
Q After you left?
A Correct.
Q Was there any -- I take it it was Slowik talking to your husband?
A Correct.
Q Was anyone else there that you know of?
A I don't believe so.
Q Okay. And can you tell me how -- what the interpretation was that you and your husband put on that comment?
A That he was a lucky guy to have a woman like that.
Q Well, that's what he said. What interpretation did you put on that?
A It was just offensive.
Q Why?
A Because I didn't think that was

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appropriate to tell my husband. -

Q Why?

A It just wasn't. It was -- it didn't need to be said. "A woman like that." That's pretty condescending.

Q You took it as a condescending comment?

A Condescending and sexually offensive.

Q Tell me what is in there that is sexually offensive to you in that comment.

A Well, the comment itself. He could have said Kim -- you are fortunate to have a wife like Kim, she is a hard worker, anything work-related but "a woman like that." The connotation behind that, I can only guess on.

Q Well, I am asking you to do that because you take offense at it and I want to know what offense you took?

A That I had a very -- very nice dress on. He was looking at me from -- my husband said he wasn't looking at my face. He was looking at my legs and my rear end when he said it. That's what

makes it sexually offensive.

Q So putting it within the context of

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what he said is what gives it its meaning?

A Correct.

* * *

Q Did anything else occur at that party?

A Yes, it did.

Q Tell me about that.

A An Ted was walking by me, he patted my

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rear.

Q Was that before or after this comment?

A I believe it was after.

Q After. Was Slowik drinking?

A Yes, he was.

Q Do you remember what he was drinking?

A No, I cannot.

Q Do you have any idea how much he had been drinking?

A No, I cannot.

Q Do you remember what he was drinking?

A No, I do not.

Q Who were you standing with when he did that?
A I cannot recall.
Q Was your husband standing there?
A No, he was not, but he saw.
Q Pardon?
A He saw the incident.
Q He saw that happen?
A Yes, he did.
Q And I take it you discussed that after you left, too?
A Yes, we did.

* * *

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Q What happened?
A I was asking Mr. Slowik about a customer and it was a difficult situation.
Q Tell me about it.
A I don't remember the specific work-related incident with this but he replied, "It must be hard for a woman like you, Kim, to have - hard for a woman like you to have a job like that," and --

Q What did that mean?
A And then he followed up by, "a woman with great legs."

* * *

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Q Okay. Tell me what he said again.
A "It must be difficult for a woman like you, Kim to have a job like that, a woman with great lets," something along those lines.
Q Okay. And what did you take that to mean?
A Why should my legs have any bearing on my work capability.
Q You think it was a gratuitous non-work-related comment?
A Yes, it was.

* * *

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Q Now, let's get to the March interview with Slowik, okay?
A Yes.
Q Okay. Now, what was the job you

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wanted?

A It was for a sales territory. It was taking over the Midwest territory.

Q Taking it over?

A Yes.

Q Okay. Is that a big -- would that be a big promotion?

A Yes, it was.

Q And would that mean -- if you got that job, okay, would that mean you would no longer work for Fitzgerald?

A That is correct.

* * *

Q Okay. Who would you then have worked for when you got the promotion?

A Pat Lawrence.

Q And what's his job?

A He took over Scott's position. Scott

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was the gentleman who reported to Ted. The sales representatives reported to Scott.

Q He was the national sales coordinator

director something?

A Correct.

Q And do we know his last name?

A I cannot recall Scott's last name.

Q Okay. And he was the number two man under Ted in the sales area?

A I don't know if it would be considered number two.

Q But he worked -- he reported directly to Ted?

A Correct.

Q Okay. And Pat Lawrence would report to him?

A Pat Lawrence would report to Ted.

Q And if you get the job, you would report to Pat Lawrence?

A. Correct.

Q Which would put you in the Slowik chain of command?

A Correct.

Q Now, when was the interview?

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A The interview with Ted was in March.

Q Okay. You had already had an interview with Lawrence?
A Yes, I had.
Q Okay. Where did that occur?
A In -- with Pat Lawrence?
Q Yes.
A Pat Lawrence, the interview took place in my office at the 333 South Wacker location.
Q Is that where Pat Lawrence worked?
A No, it was not.
Q Where did he work?
A He worked from his home in Texas.
Q In Texas?
A Yes.
Q Okay. So he interviewed you in your office?
A Correct.
Q Okay. And how did that interview go? Tell me about that. What happened?
A It went very well. We discussed my qualifications, what I had been doing, my motivation. That was it.
Q Did he indicate that he was supporting

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you for the promotion?
A Yes, he did.
Q At the interview?
A Yes, he did.
Q What did he say?
A He thought that I was -- I would be very -- I would be very successful at it and he had confidence in me.
Q Okay. Was this a new job that was being created?
A No. This was taking Patrick Crosson's position.
Q What was happening to him?
A He left to go to another company.
Q Okay. So there was a vacancy?
A Yes, there was.
Q Or there was going to be a vacancy?
A Yes, there was.
Q Had he already left?
A No, he had not.
Q And how long was the interview with Pat Lawrence?

A Approximately an hour.
Q Okay. And did you tell him about your

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concerns about Ted Slowik at that time?
A I was concerned that he called me
arrogant.
Q Did Lawrence tell you he called you
arrogant?
A Yes, he did.
Q What did he say?
A He said, "Ted called you arrogant."
Q And this is obviously -- and this was
at your interview with Lawrence?
A Correct.
Q And what did you say?
A I said that it figures -- I said, "It
would figure that he called me arrogant."
Q What did Lawrence say?
A We didn't discuss it any farther than
that.
Q Just dropped it?
A Yes.
Q You just said, "that would figure" and

dropped it?
A Yes.
Q Did you say anything to Lawrence then
about why you thought he would call you arrogant?

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A No, I did not.
Q Okay. And this is in February of 1994,
correct?
A Correct.
Q And you said not a word to him about
you thought he would call you arrogant?
A No, I did not.
Q Did you describe any of the history of
offensive behavior and comments that Slowik had with
you at that time with Lawrence?
A No, I had not.

* * *

Q Whose decision was it for that

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promotion? Was it Lawrence's or was it Slowik's?
A It was Ted Slowik's and Pat Lawrence
combined.
Q Okay. But Slowik was the boss?

A Yes, he was.
Q So would you say it was his ultimate decision?
A Yes, it was.
Q Where did the mid-March Slowik promotion interview take place?
A I am sorry?
Q The Slowik mid-March promotion interview take place, where?
A It took place at the Marriott Suites in Rosemont.
Q And that was the same place you had the initial job interview?
A That's correct.

* * *

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Q Tell me about -- tell me what happened at the interview as specific as you can recall.
A Well, he started off letting me know that he had his hesitations for hiring me.
Q Okay. Now, there is only two of you at this?
A This is correct.

Q Now, were you sitting at a cocktail table?
A No, we were sitting at the bar on the stools.
Q So sitting next to each other?

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A Correct.
Q Now, when you said he expressed his hesitancy, what did he say?
A That's exactly what he said. "I have my hesitations having you in this position."
Q Okay. And you said?
A And I confronted him and I said, "I heard you called me arrogant," and he said, "Yes, I did."
Q And you said?
A And I said, "Is it because I am not loose enough for you, Ted?"
Q And he said?
A He said, "Well, yeah -- he said yes.
Q He said yes?
A Yes, he did.
Q Okay. And then what happened?

A At --
Q Was the word loose your word, you used the word?
A I used it because he had used it on me before.
Q When?
A At the Fifth Season.

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Q Okay. In the -- the all-female band when you were leaving or getting ready to leave?
A Correct. And at that point he reached over and rubbed my knee again.
Q Right at that point?
A I don't recall if it was exactly at that point.
Q And what did you do?
A I pulled my leg away again.
Q And?
A And he went on discussing the job.
Q What did he say about the job?
A He was telling me it was hard work, that I was going to be traveling a lot; "isn't your husband going to miss you?"

Q What did you say?
A And I said, "My husband supports me in whatever I do," and I don't recall any more of the conversation than that.
Q How long did it go on?
A Less than 15 minutes.
Q And he said he had his hesitancy about you taking the job.
You asked him if it was because

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you weren't loose enough and he said yes.
He then rubbed your knee. He then started telling you that the job was going to be hard, you are going to travel a lot, won't your husband miss you?
A I don't remember if it was in that exact order, but these were the topics that were covered.
Q Anything else?
A Not at that time that I can recall.
Q What do you mean "not at that time?"
Was that your recollection of the whole interview?
A Correct.

14 Q How did he leave it with you?
15 A It was rather on a down note because I
16 was very embarrassed and humiliated again.
17 Q What?
18 A I was very embarrassed and humiliated
19 again and it was ended then when Pat Lawrence came
20 to the bar.

* * *

[p. 204]

1 Q How long after the Slowik interview at
2 the Marriott Suites?
3 A Approximately two weeks.
4 Q Okay. So it would have been around the
5 end of March then?
6 A Correct.

* * *

9 Q Okay. And who did you hear from?
10 A I heard from Ted.
11 Q Directly?
12 A Yes.
13 Q Okay. Now, the way it was left with
14 you was you were going to be hearing from Lawrence;
15 is that right?

16 A That's what I assumed.
17 Q Okay. And did Ted call or did he come
18 out to Chicago?
19 A He called.
20 Q From New York or you don't know?
21 A I don't know where he was.
22 Q Okay. And what did he say to you?
23 A He said, "Well, Pat wants to hire you
24 so you have an option. You can either stay with

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1 Betsy and take on some of her accounts or take this
2 sales territory.

* * *

[p. 206]

2 Q Okay. And did you make the decision
3 right then and there on the phone?
4 A Yes, I did.
5 Q And you said you wanted the new sales
6 job?
7 A Yes, I did.
8 Q Okay. What was the title?
9 A I don't recall. Everyone called it
10 something different on their business cards. Sales

representative, manager territorial -- I don't remember. They called it different things.

Q What did you eventually have put on your card?

A I don't think I ever had cards made.

Q Okay. What, if anything else, did Slowik say to you on the phone during that conversation other than Pat wants you and you have got your choice of the Betsy job or the other job?

A I know that he had made another one of his sexually inappropriate comments.

Q In this phone conversation?

A Yes.

Q What did he say?

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A I don't recall exactly what he said but I was crying when I hung up the phone.

Q Did he know you were crying? I mean, were you crying on the phone? -

A No, he did not.

Q Now, for -- correct me if I am wrong, but for a comment to cause you to start to cry, it had to be a very offensive comment, I would assume,

so can you tell me what it was?

A I cannot recall exactly what it was because every time I was on the phone with him I ended up most -- in tears.

Q Okay. When you say you don't remember exactly what it was, do you remember generally what it was?

A It was something sexually inappropriate because that's what he would say to me all the time that's what it was and that's what always broke me down into tears.

* * *

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Q Okay. And did anything happen during the San Francisco conference that you found offensive?

A For the first three or four days, he completely ignored me and didn't even say hello, and I believe on the last day I had to run to the bathroom because I was crying because he had said something sexually inappropriate to me again.

Q Okay. Let's back up a little bit now. When you say he completely ignored you, tell me.

Describe that.
A I would walk past and he wouldn't say hello. He wouldn't acknowledge my promotion, did not say anything to me.
Q Okay. And this is all within a few days of you just having gotten the promotion?
A That's correct.
Q Okay. So for three days he didn't speak to you at all?
A Correct.
Q Didn't say a word?
A Correct.

* * *

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Q And did anyone say why is this going on, why do you think?
A The conversation -- I didn't want the conversation to progress.
Q What do you mean, "progress?"
A I didn't want to get into the whole sexual harassment conversation so I dropped it.
Q Okay. People would say why is he doing this and you would say I don't know or -

A I don't believe they asked me that. You asked me why.
Q Okay. Were there any other conversations you had with Burlington people about the way Ted was treating you in San Francisco?
A Not San Francisco, no.
Q Okay. Now, where did the incident that caused you to have to run to the bathroom in tears, where did that happen?
A That was in the conference center.
Q Okay. And was that after this dinner we just talked about?
A Yes, it was.
Q And what did he say?

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A I don't recall exactly.
Q Well, generally, what did he say as best you can recall?
A Generally, it was something regarding my body in a sexually inappropriate way.
Q Okay. Is that your best recollection as specifically as you can get?
A Yes, it is.

Q Was it about your legs, do you know?
A I do not recall.
Q Was it an -- what was the context of it? How did it come up?
A Just in passing.
Q What do you mean, "just in passing?"
A Walked past me and said something to me and kept walking.
Q You don't recall what it was?
A No, I do not.
Q But it caused you to -
A Run to the bathroom.
Q To run to the bathroom?
A Yes.

* * *

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Q He was passing by you when he said it; is that correct?
A He was passing by.
Q Did he stop to talk to you?
A Just briefly for the comment.
Q Okay. Do you recall what the comment was?

A I have. I have recalled. It was -- I don't recall exactly the comment, but it was something regarding my "ass".
Q What did he say as best you recall?
A I don't recall exactly but I know that he referred to my back end as my ass.

* * *

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Q Describe what that means, will you, please? please?
A When he would stare at my back end or my chest or my legs for a long time.
Q I'm talking specifically about the incident in San Francisco when he made a comment about your rear end, what specifically did he do?
A He looked for a prolonged period of time at my back end.
Q Was he standing in front of you or behind you?
A. In front of me.
Q. Face-to-face?
A. A little off to my right or my left. I can't recall.

Q. And how long did that take place?
A. Could you rephrase that?
Q. How long did he stare at you?
A. He stared for approximately five seconds.
Q. So he did stop when he was passing by you?
A. That is correct.

* * *

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Q. Is there anything about that telephone call that you remember?
A. Yes, I do.
Q. Can you tell me what it is that you remember?
A. I recall that he told me a joke, a very offensive joke about blonds, a limo and sex.

* * *

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Q. Other than your recollection that he told you a joke about -- that it had something to do with blonds, a limo and sex, is there anything else about that phone call that you recall?

A. No, I do not.
Q. After San Francisco other than that telephone conversation, did you have any other conversation with Ted Slowik?
A. Yes, I did.
Q. When?
A. Approximately April or May.
Q. It was on the telephone?
A. Correct.
Q. Where were you?
A. I don't recall.
Q. Was it before or after the blond and the limo joke?
A. I don't recall.
Q. Can you tell me what it is you do recall

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about that telephone conversation?
A I recall that at the time I was getting permission, special permission for a customer of mine so that I may print a color copy of their logo so that they could see the logo in color on paper and then see it actually woven in a fabric before they purchased it.

Q Okay. That's what the conversation was about?
A That was the beginning of the conversation.
Q Did you call him or did he call you?
A I don't recall.
Q When you say that was the beginning of the conversation, what do you mean?
A That was how the conversation started out and --
Q Stop there for a minute. When you say started out, you mean you were requesting permission to do that?
A That is correct.
Q Go on. I'm sorry.
A And at that point Mr. Slowik said to me something along the lines of I don't have time for

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you right now, Kim, unless you're telling me -- unless you want to tell me what you're wearing.
Q What did you say?
A At that point I said I had to go and I hung up.

Q Did you ever get permission to do what it is you sought to do?
A I telephoned the following day.
Q Telephoned who?
A Or I had a telephone conversation with Ted the following day or the day after that. I don't recall.
Q So either the day after or two days after that conversation you had another conversation with Slowik?
A Correct.
Q Okay. And what was that about?
A I was requesting permission again because I did not get a response the first time.
Q Okay. To put this logo into the fabric?
A Correct.
Q Okay. And?
A And at that point he told me no, that I did not have permission to do that and said to me

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something along the lines of are you wearing shorter skirts yet, Kim, because it would make your job a whole heck of a lot easier.

Q When did this occur as best you recall?
A In May.
Q Early May or late Nay?
A I believe it was late May.
Q Why do you believe it was late May?
What is it about it that refreshes your recollection?
A Because that was the conversation that I realized that I was not going to be going forward in my job and this sexual harassment was going to continue by Mr. Slowik.
Q When you say not going forward in your job, what do you mean?
A Meaning that I would be declined over and over again for special permission to do special projects for customers.
Q So you interpreted I take it that if you don't get special permission to do things that you are not going forward in your job; is that correct?
A That is correct.
Q When he suggested that shorter skirts

* * *

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Q Why did you call him rather than Pat Lawrence who you worked for?
A Because Rich was the gentleman who was ultimately responsible for C & E.
Q Now, did he work above or below Pat Lawrence in the chain of command?
A I believe they were equal.
Q And when you called Rich and asked -- why did you call Rich?
A To discuss this special project that we were going to be doing with C & E.
Q And this was embroidering the logo into a fabric?
A That is correct.
Q As a sample?
A That is correct.
Q What did Rich tell you?
A He told me that we would need to speak to Ted or specifically I would need to speak to Ted.
Q Did he say we need to speak to Ted or did he say you had to speak to Ted?

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A I believe it was I had to speak to Ted.
Q And that's when Ted rejected the request after the second time you called him?
A That is correct.
Q And the only thing he said the first time you talked to him was I am too busy to talk to you now unless you tell me what you're wearing; is that correct?
A Yes, it is.
Q Yes?
A Yes.
Q Did you take his comment about what you're wearing to be offensive?
A Yes, I did.
Q Can you tell me in what manner you understood that to be offensive?
A In a normal business conversation one would not ask someone of the opposite sex what they were wearing on the other end of the phone.
Q Okay. Do you interpret everything that doesn't occur in a normal conversation to be offensive?

A No, I do not.
Q. Will you tell me, please, what there was

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about what are you wearing that you took to be offensive?
A It shouldn't matter what I was wearing and if my answer was not going to be or my question was not going to be answered unless I told him what I was wearing it's very inappropriate.
Q And you took offense at it because you felt it was inappropriate?
A Yes, I did.
Q Pardon?
A Yes.
Q Is there anything else about it that you deemed offensive other than what you have just said?
A I just found it very offensive.
Q I understand that. Is there anything else about it that you found offensive other than what you just said?
A Yes, but I am having trouble putting it into words.

Q Well, take your time.
A I suspected that he wanted me to tell him that I was wearing a nighty or something, that is how I took that conversation to mean.

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Q You interpreted his comment about tell me what you're wearing to mean that he wanted you to tell him you were wearing a nighty or something like that?
A Or a short skirt that he seems to like or something that would give him a little thrill during the day.
Q But that was your interpretation of it?
A That is correct.

* * *

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Q Sometime within a day or so you called Slowik back; is that correct?
A That is correct.
Q And he denied you permission to do the special project?
A That is correct.

Q As best you recall can you tell me exactly what you said and what he said in the second conversation to the best of your recollection?
A I tried to explain to him why I needed this project done and he said no and then asked me am I wearing shorter skirts yet because it would make my job a whole heck of a lot easier.
Q What did you say?
A I don't recall.
Q Did you say anything?
A I may have said I had to go and hung up.
Q This is in the latter part of May; is that correct?
A That's correct.

* * *

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A I was telling him ways that I thought that I could improve upon what Patrick Crosson had been doing.
Q And did Patrick Lawrence in your opinion seem to think it was a good idea?
A Yes, he did.
Q Did he tell you that?

9 A Yes, he did.
10 Q Did you have any other conversation
11 during that April and May period that you were in
12 your new job with Patrick Lawrence regarding your 13
job performance?
14 A No, there was not.

* * *

[p. 277]

22 Q Prior to your leaving the
23 employment at Burlington, did Patrick Lawrence who
24 was your immediate supervisor ever criticize your job
[p. 278]
1 performance?
2 A No, he never criticized my job
3 performance.

* * *

7 Q Did he ever point out to you what
8 he perceived to be shortcomings in your job
9 performance to your knowledge?
10 A He pointed out later on some items that
11 could possibly improve my performance.
12 Q When you say later on, what do you mean?
13 A It was in May.

* * *

[p. 280]

12 Q And can you tell me the substance of
13 that conversation?
14 A I believe we were continuing discussing
15 how I could change ways or varying ways of
performing
16 than Patrick and I know that he mentioned a few
17 things that I could change from what I was already
18 doing.
19 Q He being Lawrence?
20 A Correct.
21 Q What kinds of things?
22 A I don't recall specifically.
23 Q Did you interpret his comments as
24 criticisms?
[p. 281]
1 A Yes, I did.
2 Q Pardon?
3 A Yes, I did.
4 Q Did you interpret his comments as
5 pointing out shortcomings in your performance?
6 A At that point, no.

Q When you say at that point no, what do you mean?
A At that moment of the conversation I did not.
Q Did you later?
A Yes, I did.
Q When did you later put that interpretation on the conversation?
A When Patrick Lawrence wrote me a letter.
Q Was that letter a follow-up to the conversation at John's Garage?
A It was not a follow-up to that conversation, no.
Q Do you know what triggered him sending you a letter regarding your job performance?
A To the best of my knowledge I believe there were, from what I understand, a couple of customers who didn't feel as if I were paying enough

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attention to them.
Q. What do you mean not paying enough attention to them?
A. That I was ignoring them.

Q. And how many customers do you understand were complaining that you were ignoring them?
A. I believe it was about two.
Q. And how do you understand they claimed you were ignoring them?
A. I don't understand how they claimed that I was.

* * *

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Q. Now, if you read the last sentence of the first paragraph it refers to a phone conversation that you had four days earlier, do you recall that?
A. No, I do not.
Q. Do you see the reference there?
A. Yes, I do.
Q. To the 18th?
A. Yes, I do.
Q. Do you recall that telephone conversation?
A. No, I do not.
Q. Do you have any memory of having a telephone conversation with Patrick Lawrence some time in the middle or the end of May regarding your

job performance?
A. I don't recall a telephone conversation at all with Pat Lawrence regarding my job performance.

* * *

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Q. Now, that relays to you, does it not, a complaint regarding the not returning of phone calls; is that right?
A. That is correct.
Q. And it refers to both complaints from customers and other Burlington employees, doesn't it?
A. That is correct.
Q. And in it he points out that not returning a call or returning it late is inexcusable, isn't it?
A. That is what it says.
Q. Do you recall in addition to this memo having discussed that with Patrick Lawrence?
A. I never discussed this with Patrick Lawrence on the telephone.

* * *

[p. 285]

You are now saying you never discussed it with him on the telephone, not that you don't remember discussing it; is that correct?
A. To the best of my recollection I never discussed this with Patrick Lawrence on the telephone.
Q. All right. Did you discuss the not returning of phone calls with Patrick Lawrence at John's Garage?
A. Yes, I did.
Q. And did he tell you that there were complaints from both customers and other Burlington employees about the lack of responding to phone calls?
A He discussed approximately two customers that were complaining.
Q Did he tell you other Burlington employees were complaining about not returning phone calls?
A Yes, he did.
Q And who did he tell you was complaining?
A A gentleman by the name of Scott.

Q Scott?
A Scott?

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Q. Who is Scott?
A. Scott is -- I don't recall his job title.
Q. Where does he work?
A. New York.
Q. And Lawrence told you that Scott complained that you didn't return his phone call?
A. That is correct.
Q. And you recall two other customers?
A. Approximately two.
Q. Who were they?
A. I don't recall.
Q. Now, did you get this memo before or after you had your conversation with Patrick Lawrence on the train?
A. This was after.

* * *

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Q. Now, in the third full paragraph of Deposition Exhibit 2 Patrick Lawrence wrote that he

felt you were not on the job long enough nor do you have enough experience to begin changing systems in dealing with customers, doesn't it?
A. That is what it says.
Q. Pardon?
A. That is what is written.
Q. Now, did you interpret that as him having changed his mind from the conversation you had with him on the train?

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A. Yes, it is.
Q. Is this the first you knew that Patrick Lawrence thought you were too inexperienced to be changing the patterns of dealing with customers?
A. That is correct.
Q. Now, the first sentence says that you had a discussion about deviating from patterns Patrick had established; is that right?
A. That is correct.
Q. And up until you got this you thought that he approved of your changing of patterns?
A. That is correct.
Q. Okay. Did you call him and tell him

that --
A. No, I did not.
Q. -- what is going on here, I am getting mixed signals from you?
A. I did not.
Q. In your discussion with Patrick Lawrence at John's Garage, did Patrick Lawrence tell you that customers felt you weren't paying enough attention to detail?
A. I don't recall.
Q. Prior to receiving this memorandum, do

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you recall any conversation with Patrick Lawrence, whether in person or on the phone, where he told you that customers felt you weren't paying enough attention to detail?
A. I don't recall.
Q. Do you recall him having said this in this memorandum as you sit here now?
A. Yes, I do.
Q. Did you have any other discussion with Patrick Lawrence regarding his comment that customers felt you weren't paying enough attention to detail?

A. No.
Q. Pardon?
A. No.
Q. You had no other conversation with him about this?
A. No.
Q. Other than getting this memo?
A. Correct.
Q. After you got Deposition Exhibit No. 2, did you get in touch with Patrick Lawrence regarding the substance of what is in Exhibit 2?
A. No, I did not.
Q. Did Patrick Lawrence ever tell you that

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several major customers don't perceive that you are concerned about them and their business?
A. No, I don't recall that.
Q. Let me direct your attention to the last paragraph of Deposition Exhibit No. 2 and would you tell me if that refreshes your recollection regarding whether or not he told you several major customers don't perceive that you were concerned about them and their business?

A. I was only aware of this after this letter was -
Q. I'm sorry, I can't hear you.
A. I was only aware of it after I received this letter.
Q. Okay. Now, the last sentence of the first paragraph says that the matters contained in Exhibit 2 are the same matters he discussed with you by phone on the 18th, do you see that?
A. I see that.
Q. Okay. Do you have any recollection of having discussed any of these matters with Patrick Lawrence on the phone?
A. No, I do not.

* * *

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Q. Would you describe for me what you perceived your relationship to Pat Lawrence to be? Was it a good working relationship?
A. Yes, it was.
Q. Up until the time you got this memo did you believe he was satisfied with your job performance?

A. That is correct.
Q. Does this memo come as a surprise to you?
A. It did.
Q. Were you shocked?
A. Yes, I was.
Q. Were you disappointed?
A. I was not disappointed. I wanted to work to make it better if this is what the feeling

[p. 295]

was.

* * *

MR. CASEY: Q. Ms. Ellerth, prior to the time that you completed your job -- Prior to the time you left your job or terminated your employment at Burlington Industries, did you ever determine from Pat Lawrence or anyone else who the major customers of yours were that were complaining about your lack of concern regarding them and their business?
A. Yes, I did.
Q. Who were they?
A. I believe it was a plant called Milton

Johns and a company by the name of Therapedic.
Q. Where are those two companies located?
A. Milton Johns is in Chicago and
Therapedic is in Rock Island.
Q. Now, if you never discussed Exhibit 2

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with Patrick Lawrence, how did you determine who
those customers were?
A. I asked Donna Thibideau if she had
received any conversations of complaints.
Q. And she told you she had?
A. Yes.
Q. From those two?
A. Correct.
Q. Do you know if there were any others?
A. Not that I can recall.
Q Now, why would you ask Donna Thibideau
and not Patrick Lawrence?
A Because I wanted Donna Thibideau's
opinion because she speaks with the customers. She
is the customer service manager and she speaks to
customers every day.
Q But she wasn't your supervisor, was

she?
A. No, she is not. No, she was not.
Q When was your last day of work at
Burlington?
A I believe it was the last day of May
1994.
Q May 31st?

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Q. On June 1st you just didn't show up to
work; is that right?
A. No, that is incorrect. I left a message
with Pat Lawrence on his answering machine and
followed it up with a letter.
Q. What message did you leave on his
answering machine?
A. That as of today, whatever that day
was
Q. May 31st?

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A. I believe it was May 31st. That I was
quitting.
Q. And you followed up with a letter?
A. Yes, I did.

Q. Is that all you said in the phone conversation -- on the phone message?
A. I don't recall exactly what I said.
Q. That was the substance of it though?
A. Correct.
Q. How long later did you write the letter that you followed up with?
A. I believe it was that day.
Q. Pardon?
A. I believe it was that day that I quit.
Q. May 31st?
A. I don't recall.

* * *

[p. 300]

Q. Okay. In the middle and toward the end of the second paragraph there appear to be blank spaces, do you see that?
A. Yes.
Q. Is that the condition that this letter was in when you sent it?
A. Yes, it is.
Q. And can you tell me why you typed it the way you typed it?

A. That was a full paragraph and I whited out that white space with white out.
Q. You whited it out?
A. Correct.
Q. Why did you white it out?
A. Because I was explaining Ted's sexual harassment underneath that white out and my husband advised me not to leave it in there.
Q. Was your husband at work with you that day?
A. No, he was not.
Q. Well, when did you talk to your husband about whiting it out if you sent this on your last day at work and you faxed it?
A. I worked from my home and my husband

* * *

[p. 307]

what is whited out after the word true in that sentence?
A. I can't read all of the words behind here.
Q. Tell me what you can read.

* * *

THE WITNESS: A. "What I did not want to mention to you was the fact that Ted had harassed me in the past and I simply ignored him to save my job.

MR. CASEY: Q. Is that that full sentence?

A. Yes, it was.

Q. Pardon?

A. Yes.

Q. Now, who whited this out?

A. I did.

Q. And you agree, do you not, that Mr. Lawrence never received a copy of this letter without the white outs?

A. That is correct.

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Q. Now, can you tell me what is whited out, if you can, beginning at the end of Line 12 and going into Line 13 in the second paragraph following the word past?

A. "Needless to say these incidences could be seen as sexual harassment."

Q. What incidents?

A. All of the incidences that I have testified to.

* * *

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Q. Now, let's go to Line 14, Paragraph 2 and if you can, can you tell me what was typed in after the word -- I'm sorry, what was whited out after the word make?

A. "What a shame that one man can have such an influence."

Q. What do you mean by that?

A. Pat Lawrence was deciding whether or not to hire me and Ted had say in my hiring and made Pat's decision difficult.

Q. Who told you that?

A. Pat Lawrence.

Q. When did he tell you that?

A. At time of interviewing.

Q. Before you got the job?

A. Correct.

Q. Before you even interviewed Ted Slowik, isn't that right?

A. It was before my hiring.

* * *

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Q. Would you please give me a list of every person at Burlington Industries who you told about the conduct of Ted Slowik of which you are now complaining?

A. At Burlington Industries?

Q. That's correct.

A. Patrick Crosson.

Q. When did you tell him?

A. I told him during the last week of our training.

Q. Of our training?

A. Of my training for the new position.

Q. Which would have been around the end of March of 1994?

A. Correct.

Q. You told him during that week of training?

A. Yes, I did.

Q. Which was after San Francisco; is that

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correct?

A. Correct.

Q. The week after San Francisco?

A. The week after San Francisco.

Q. So that's when you told Patrick Crosson?

A. Correct.

Q. He was already leaving the company at that point?

A. Correct.

Q. In fact, he had already started working at his new job, hadn't he?

A. Yes, he did. Brett Schneider.

Q. Who is Brett Schneider?

A. He is a sales representative.

Q. That would have been a job the same as your job?

A. Correct.

Q. When you got your promotion?

A. Correct.

Q. So he would have been an equal to you?

A. Correct.

Q. When did you tell Mr. Schneider?

A. Sometime during the last two weeks of my employment.

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Q. But he was in no way a supervisor of yours?
A. No.
Q. He was a peer?
A. Correct.
Q. Who else?
A. And I believe that everyone else that I referred, even referred that Ted had done anything inappropriate I have testified to during the first deposition.
Q. During what?
A. During the first deposition.
Q. Those are those ladies in New York?
A. Correct.
Q. Who you told about the jokes but you didn't tell them about the comments about your legs; is that correct?
A. Correct.
Q. Pardon?
A. Correct.
Q. And that's all you told them, Laura Peffal and Marilyn?

A. Correct.
Q. Whose last name you don't remember?

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A. Correct.
Q. Those are the two ladies in New York you told?
A. Correct.
Q. Was there anyone else in New York you told?
A. I don't recall.
Q. But you do recall all you told them was about the jokes at lunch with Angelo?
A. Correct.
Q. But not about the comments about your legs?
A. Correct.
Q. Those were not superiors of yours, were they?
A. No.
Q. And did you say anything to Donna Thibideau?
A. I had mentioned something to Donna Thibideau at one time.

Q. What did you tell Donna Thibideau?
A. I believe I already testified to that in my first deposition.
Q. Okay. I am asking you if you can recall

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it now.
A. I don't recall exactly what I said to Donna.
Q. And what was Donna's job?
A. Customer service manager.
Q. So you didn't work for her either, did you?
A. No, I did not.
Q. In fact, did Donna indicate to you that there was another lady who had been harassed by Ted?
A. Yes.
Q. Who?
A. Ann Pillow.
Q. Is there anyone else you told? You got Crosson, you got Schneider, you got two ladies in New York and you got Donna Thibideau.
A. And Sherry Hester.
Q. Who is she?

A. Customer service representative.
Q. Down in North Carolina?
A. Correct.
Q. You told her what?
A. I don't recall exactly what I told Sherry.

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Q. She wasn't a supervisor of yours, was she?
A. No, she was not.
Q. Anyone else?
A. At this point I can't recall.
Q. Anyone else?
A. Correct.
Q. Had you ever told Patrick Lawrence before you wrote the letter?
A. No, I had not.
Q. And he was your supervisor, wasn't he?
A. Yes, he was.
Q. Why didn't you ever tell Patrick Lawrence that you had been harassed?
A. I didn't tell Pat because I was afraid that when Ted was confronted with this that my job

would be more difficult.
Q. More difficult than it was?
A. More difficult because I was telling them what had occurred.
Q. Who would have made it more difficult in your mind?
A. Pat Lawrence, Ted Slowik and anyone else who could make my job more difficult.

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jeopardy.
Q. And you felt that telling Lawrence would put your job in jeopardy?
A. Yes, I did.
Q. His boss already knew that you were being harassed and that you were ignoring it, didn't he?
A. Yes, he did.
Q. According to your version of events here?
A. Correct.
Q. So how would telling Patrick Lawrence put your job in jeopardy?
A. Because it would be his duty as my

supervisor to report any incidents of sexual harassment.
Q. And you believed he would do that, wouldn't he?
A. I don't know. I would hope that he would.
Q. And that's why you didn't tell him because he had a duty to report it?
A. I would have hoped that he would do his job to report it, but I did not want to tell him

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about it because he would report it thus putting my job in jeopardy.
Q. You didn't give him the opportunity to report it, did you?
A. No, I did not.
Q. Did you ever read the Burlington Company employee handbook?
A. Yes, I did.
Q. Did you read in there that there was a companywide policy against sex harassment?
A. Yes, I did.
Q. In fact, you signed acknowledging

receipt of the handbook, didn't you?
A. Correct.
Q. And you did read it?
A. Correct.
Q. And the handbook also said that if you didn't feel comfortable talking to your own supervisor that you could talk to human resources or personnel, didn't it?
A. I don't recall that part of the --
Q. Do you recall anything in the handbook giving you the option of talking to somebody other than your immediate supervisor?

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A. No, I do not.
Q. In any event you chose not to do that, didn't you?
A. Chose not to do what?
Q. To report the conduct of Ted Slowik.
A. Correct.
Q. To anyone in authority.
A. Correct.
Q. Isn't that right?
A. Correct.

Q. But you do remember reading that there was a companywide policy against sexual harassment in the company, didn't you?
A. Correct.
Q. Does Burlington have a human resources department?
A. Yes, it does.
Q. You never told anyone in human resources about it, did you?
A. No, I did not.

* * *

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Q. Do you recall anything in the handbook that said if you had any concern about a work related matter you could talk to your supervisor or if you didn't feel comfortable talking to your supervisor you could talk to the personnel manager?
A. I don't recall that, no.
Q. You did read it though, didn't you?
A. At one point, yes.
Q. When you were being subjected to the course of conduct that you have testified here to in the last two days, did you review the employee

handbook as to what options you had, what kind of protection you may have had?

A. No, I did not.

Q. Why?

A. Because my husband advised me not to say anything to anyone or my job could be in jeopardy.

* * *

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Q. Did you ask your husband why he thought your job would be in jeopardy?

A. We discussed it, yes.

Q. Why did he think your job would be in jeopardy?

A. Because if someone were aware of these incidences and went to Ted with them that I had gone to someone regarding this that it would be very easy for Ted or anyone else to find reasons to make my job more difficult or to fire me.

Q. So you and your husband decided among yourselves that you ought not tell anyone at Burlington in any authority about what was going on; is that correct?

A. Correct.

Q. That's a decision you and your husband made?

A. Correct.

Q. And that's not based on anything that anyone at Burlington ever told you; isn't that right?

A. That's correct.

Q. That's just you and -- What is your husband's first name?

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A. Steve.

Q. You and Steve Ellerth sitting at home discussing this?

A. Correct.

Q. And he thought that it would be better for you to endure sexual harassment and keep your job than it would be to report it and try and correct the situation; is that right? That's what he thought?

A. That's correct.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

KIMBERLY B. ELLERTH,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil No. 95 C 0839
	)	
BURLINGTON INDUSTRIES, INC.,	)	JUDGE CASTILLO
	)	
Defendant.	)	

PLAINTIFF'S RESPONSES TO DEFENDANT'S RULE 12(M) STATEMENT OF MATERIAL FACTS

Statement No. 1: Ellerth currently resides at 117 Crescent Lane, Schaumburg, Illinois. (Compl., Ex.).

RESPONSE TO STATEMENT NO. 1: Admit.

Statement No. 2: Burlington is a Delaware corporation with a Chicago office located at 311 South Wacker Drive Suite 3375.

RESPONSE TO STATEMENT NO. 2: Admit.

Statement No. 3: On October 17, 1994, Ellerth's charge of discrimination was received by the Illinois

Department of Human Rights and cross-filed at the Equal Employment Opportunity Commission on October 28, 1994. On October 12, 1994, Ellerth requested a Notice of right to sue from the EEOC which she received on December 2, 1994. The EEOC issued the Notice of right to sue because it determined it would be unable to complete its investigation process within 180 days from the filing of the charge. (Compl., Ex.)

RESPONSE TO STATEMENT NO. 3: Admit.

Statement No. 4: On February 9, 1995, Ellerth filed her complaint in which she claimed she was subjected to a sexually hostile work environment, resulting in her constructive discharge. (Compl., ¶4).

RESPONSE TO STATEMENT NO. 4: Admit.

Statement No. 5: Burlington is a manufacturer of textiles and home furnishings which employs over 22,000 people and operates more than 50 plants and offices. Burlington maintains its corporate office and manufacturing headquarters in Greensboro, N.C. and its merchandising headquarters in New York, N.Y. Sales office are located throughout the world. (Handbook, p. 1, Ellerth Dep. p. 13).

RESPONSE TO STATEMENT NO. 5: Admit.

Statement No. 6: Ellerth holds a Bachelor of Science degree in education from Western Illinois University.

Ellerth graduated in 1992. (Ellerth Dep., p. 4-7, Ex. 1).

RESPONSE TO STATEMENT NO. 6: Admit.

Statement No. 7: Ellerth first interviewed with Burlington in March, 1993. Ellerth interviewed with Mary Strenk Fitzgerald ("Fitzgerald") for the position of merchandising assistant in Burlington's Chicago office. Fitzgerald works as a national accounts manager in Burlington's Mattress Fabric, or "Ticking" Division which manufactures and sells fabric covers for mattresses. (Ellerth Dep., pp. 12-17.)

RESPONSE TO STATEMENT NO. 7: Admit. Ellerth adds, however, that the interview with Fitzgerald was only the first of a set of two interviews, the second interview being with Ted Slowik, defendant's vice-president of sales and marketing, Fitzgerald's direct superior. (Pl. dep. 48:2-3.)[1] (See response to Statement No. 8.)

Statement No. 8: Shortly after the Fitzgerald interview, Ellerth had a second interview with Burlington. Ellerth met with Theodore Slowik ("Slowik") for approximately 15 to 30 minutes in a restaurant at the Marriott Suites in Rosemont, Illinois. (Ellerth Dep., pp. 0-22, 29.)

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[1] Reference to "Pl. dep. ___." are references to portions of plaintiff Kimberly Ellerth's deposition transcript, attached as Pl. Ex. C to the appendix to plaintiff's answer brief.

RESPONSE TO STATEMENT NO. 8: Admit. Ellerth adds that during this job interview of plaintiff by Slowik, Slowik asked Ellerth if she was married, if she was "planning on having a family" and if she was "practicing" to have a family with her husband. (Pl. dep. 25:2-8; 26:g-11.) Ellerth thought that the question about whether she was married was "inappropriate" in the context of a job interview, and the question about whether she was "practicing" to have a family with her husband was "offensive" and "humiliating." (Pl. dep. 25:2-8; 26:21-27:3; 29:2-7.) Then, also during this interview, Slowik stared at Ellerth in a sexual way by staring at her breasts and legs for "constant" and "prolonged periods of time." (Pl. dep. 85:13-15; 87:15-24.)

Statement No. 9: Slowik works out of Burlington's New York office and holds the position of vice president of sales and marketing for Burlington's House Mattress Ticking area. (Slowik Dep., pp. 7-8).

RESPONSE TO STATEMENT NO. 9: Admit. Ellerth adds, however, that Slowik travels "an awful lot" on his job, "perhaps" 50% of the time. (Slowik dep. 9:24-10:2.)[2] Slowik traveled to the Chicago office where Ellerth worked approximately "a day or two every month or two." (Pl. dep. 46:22-47:21.) In addition, Ellerth and Fitzgerald were the only two people who worked in Slowik's Mattress and Fabric Division in the Chicago office, and Slowik would talk to Ellerth in Chicago on the phone approximately "once a week." (Pl. dep. 44:18-45:15; 130:14-131:18.) Slowik also

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[2] References to "Slowik dep. ___." are references to portions of Ted Slowik's deposition transcript, attached as Pl. Ex. D to the appendix to plaintiff's answer brief.

traveled to Burlington's corporate office and manufacturing headquarters in Greensboro, N.C., on occasion, where Ellerth also encountered Slowik. (Pl. dep. 96:17-97:9; 102:12-105:13; 106:811; 109:3-113:17-20.) Ellerth also saw Slowik when she traveled to New York and San Francisco for her training. (Pl. dep. 58:11-59:6; 215:19-216:9.)

Statement No. 10: About one week after Ellerth's interview with Slowik, Fitzgerald called Ellerth to offer her the position, which Ellerth accepted. (Ellerth Dep., p. 33.)

RESPONSE TO STATEMENT NO. 10: Admit.

Statement No. 11: As a merchandising assistant, Ellerth's duties were comprised of assisting Fitzgerald on a day to day basis. Fitzgerald was Ellerth's direct supervisor. (Ellerth Dep., pp. 33, 39-41).

RESPONSE TO STATEMENT NO. 11, sentence No. 1: Deny to the extent that Ellerth's duties also entailed traveling to New York, San Francisco and Greensboro, North Carolina, and speaking with Slowik on the phone approximately "once a week," as well as assisting Fitzgerald in sales. (Pl. dep. 49:14-50:22; 58:23-6; 93:8-94:12; 130:14-131:18; 16:24-17:4; 215:19-216:9.)

RESPONSE TO STATEMENT NO. 11, sentence No. 2: Admit. Ellerth adds, however, that Slowik was Fitzgerald's direct supervisor. (Slowik dep. 9:1-11.)

Statement No. 12: In February and March, 1994, Ellerth interviewed for promotion to the position of sales representative for the Midwest territory. Ellerth received the promotion after interviewing with Patrick Lawrence ("Lawrence") and Slowik. Lawrence became Ellerth's immediate supervisor. (Ellerth Dep., pp. 191-198).

RESPONSE TO STATEMENT NO. 12: Admit. Ellerth adds that Slowik had the "ultimate decision-making power" about whether to promote Ellerth. (Slowik dep. 32:8-20; Pl. dep. 197:4-8.) Ellerth also adds that during this interview with Slowik, Slowik told Ellerth that he had hesitations about promoting her because she was not "loose enough" for him. (Pl. dep. 199:2-200:2.) Also during this interview, Slowik reached over and rubbed Ellerth's knee with his hand and asked her that since this new position required her to travel a lot, "isn't your husband going to miss you?" (Pl. dep. 200:3-15.) Ellerth was "very embarrassed and humiliated again" by Slowik during this interview. (Pl. dep. 201:12-20.)

To further clarify the circumstances of this interview with Slowik, Ellerth adds that prior to her interview with Lawrence, Patrick Crosson ("Crosson"), Ellerth's predecessor in the midwest sales representative position, told her that Slowik had told Crosson that he did not want Ellerth to be promoted because she was "arrogant." (Pl. dep. 187:20-24.) Slowik also told Lawrence that Ellerth was "arrogant." (Pl. dep. 188:15-19.) Then, during her interview for the promotion with Lawrence, Lawrence told Ellerth that Slowik "called her arrogant." (Pl. dep. 195:4-11.) When Ellerth confronted Slowik about this, Slowik admitted he had called Ellerth "arrogant" because she was not "loose enough" for

him. (Pl. dep. 199: 4-24.) Ellerth's deposition testimony of the job interview with Slowik for a promotion, in pertinent part, is as follows:

A: That's exactly what he said. "I have my hesitations having you in this position."

Q: Okay. And you said?

A: And I confronted him and I said, "I heard you called me arrogant," and he said, "Yes, I did."

Q: And you said?

A: And I said, "Is it because I'm not loose enough for you, Ted?"

Q: And he said?

A: He said, "Well, yes" -- he said yes.

Q: He said yes?

A: Yes, he did.

Q: Okay. And then what happened?

A: At --

Q: Was the word loose your word, you used the word?

A: I used it because he had used it on me before.

Q: When?

A: At the Fifth Season [the lounge at the Four Seasons hotel in Greensboro, North Carolina].

Ellerth understood Slowik's comment to imply that Slowik did not think that she was sexually "loose enough" for him. (Pl. aff. ¶40.)[y]

Lawrence, as defendant's national sales coordinator, also reported directly to Slowik. (Pl. dep. 191:22-192:20.)

Statement No. 13: The promotion raised Ellerth's salary $4,000.00 per year, and she also became entitled to receive a yearly bonus. (Ellerth Dep., p. 210).

RESPONSE TO STATEMENT NO. 13: Admit.

Statement No. 14, sentence No. 1: After Ellerth received her promotion, Lawrence and other Burlington employees began receiving complaints from customers and employees regarding Ellerth's job performance.

RESPONSE TO STATEMENT NO. 14, sentence No. 1: Deny to the extent that Ellerth was promoted in March 1994, and Lawrence did not receive any complaints regarding her until over two months later in May 1994, at which time the complaint Lawrence received was that she had not returned

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[y] References to "Pl. aff. ¶__" are references to plaintiff's affidavit, attached as Pl. Ex. A to the appendix to plaintiff's answer brief.

some telephone calls in a timely manner.[4] (Pl. dep. 203:22-204:6; 279:22.) In addition, only Lawrence and Thibideau received complaints from only 1-2 customers and employees. (Pl. dep. 282:5-8; 285:11-17; Pl. aff. ¶47.) Ellerth further adds that defendant possesses no documentation regarding any of these alleged customer and employee complaints. (Lawrence dep. 31:3-5; 35:20-23.)[5]

Statement No. 14, sentence No. 2: In May, 1994, Lawrence and Ellerth had conversations in which they discussed the complaints about Ellerth's performance as well as ways in which Ellerth could make improvements. (Ellerth Dep., pp. 277-282.)

RESPONSE TO STATEMENT NO. 14, sentence No. 2: Deny. In May 1994, Lawrence and Ellerth had one conversation in which they discussed varying ways she could do things at the office. (Pl. dep. 279:22-280:22.) Lawrence agreed with some of the suggestions made by about how to improve upon how Ellerth's predecessor handled certain matters. (Pl. dep. 286:17-287:5; Lawrence dep. 37:16-38:3.) Complaints about Ellerth allegedly not returning some phone calls were not mentioned during this conversation. (Pl. dep. 279:22-280:22.) This conversation took place at John's

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[4] Plaintiff's work performance is irrelevant to the matter to be decided here in that defendant has not alleged that plaintiff was discharged for poor work performance. (Defendant's answers to interrogatories, interrogatory no. 4, attached as Pl. Ex. J to the appendix to plaintiff's answer brief.)

[5] References to "Lawrence dep. ___." are references to portions of Patrick Lawrence's deposition transcript, attached as Pl. Ex. E to the appendix to plaintiff's answer brief.

Garage Burger Place in the Woodfield Mall in Schaumburg, Illinois. (Pl. dep. 280:5-281:6.)

Statement No. 15: On May 22, 1994, Lawrence sent Ellerth a memorandum addressing the complaints received about Ellerth from customers and Burlington employees. (Ellerth Dep., pp. 281-98; Ex. 2.)

RESPONSE TO STATEMENT NO. 15: Admit. Ellerth clarifies that the letter dated May 22, 1994, received from Lawrence regarded Ellerth not having returned some phone calls, from two customers and three employees. (Pl. dep. 284:8-11; 285:15-286:12.) Ellerth adds, however, that at the time she recognized that the letter from Lawrence erroneously referred to a phone conversation on or about May 18, 1994, which did not take place between Ellerth and Lawrence. (Pl. dep. 284:20-24; 293:5-24.)

Statement No. 16: On May 31, 1994, Ellerth left a message on Patrick Lawrence's answering machine informing him she was quitting. Ellerth also faxed Lawrence a letter to the same effect. The letter received by Lawrence did not mention that Ellerth had been sexually harassed by Slowik. (Ellerth Dep., pp. 297-299; Ex. 3.)

RESPONSE TO STATEMENT NO. 16: Admit. Ellerth adds that the version of the letter received by Lawrence did not refer to the sexual harassment because Ellerth had whited-out the sentences she had written regarding the sexual harassment before she faxed the letter to Lawrence. (Pl. dep. 299:9-14.) Ellerth whited-out the sentences referring to

Slowik's sexual harassment of her because her husband advised her not to leave it in there. (Pl. dep. 300:1-17.)

At her deposition, Ellerth clarified that the whited-out sentences read:

1) "What I did not want to mention to you was the fact that Ted had harassed me in the past and I simply ignored him to save my job."

(Pl. dep. 307:9-12.)

2) "Needless to say these incidents could be seen as sexual harassment."

(Pl. dep. 310:5-6.)

3) "What a shame that one man can have such an influence."

(Pl. dep. 312:8-9.)

In addition to the fax, Ellerth mailed a letter to Lawrence, dated June 21, 1994, which described the sexual harassment by Slowik. (Pl. Ex. I; Pl. aft. ¶48.) Portions of this letter read as follows:

> Before I was hired, you and I spoke about the reasons why Ted [Slowik] didn't feel comfortable around me. I told you that he had said and done some sexually inappropriate things to me in the past. What I didn't tell you was that he had on two occasions, patted my rear and every time he saw me looked me up and down like a piece of meat....My entire time at Burlington, I had to ignore Ted and try to do what I needed to do in my job.

(Pl. Ex. I.)

> Statement No. 17: During her employment at Burlington, Ellerth saw Slowik, on average, for a day or two every month or two months. (Ellerth Dep. pp. 46-47).

RESPONSE TO STATEMENT NO. 17: Deny to the extent that Ellerth also saw Slowik when she had to travel for training to New York, North Carolina and San Francisco. (Pl. dep. 58:23-6; 49:14-50:22; 93:8-94:12; 215:19-216:9.) In addition, Ellerth and Fitzgerald were the only two people who worked in Slowik's Mattress and Fabric Division in the Chicago office and Slowik would call Ellerth in Chicago approximately "once a week." (Pl. dep. 44:18-45:15; 130:14-131:18.) Slowik traveled, by his own admission, "an awful lot", about 50% of the time, and would travel to the Chicago office where Ellerth worked approximately, "a day or two every month or two" months. (Slowik dep. 9:24 - 10:2; Pl. dep. 46:22-47:21.)

> Statement No. 18: During Ellerth's initial interview with Slowik at the Marriott Suites, Ellerth alleges that Slowik asked her if she was married, if she planned on having a family, and if she was practicing to have a family. Ellerth alleges that during the interview Slowik stared at her in a sexual way. Specifically, Ellerth claims Slowik's eyes would move down to her chest area for prolonged periods of time and that he stared at

her legs. Ellerth also claims that the stares were constant during the entire interview. Ellerth claims that she was humiliated during the interview. (Ellerth Dep., pp. 25-29; Ellerth Dep. pp. 85-87, Ellerth Int. Resp. 3.)

RESPONSE TO STATEMENT NO. 18: Admit. (See response to statement No. 8.)

Statement No. 19: Following the interviews, Ellerth sent a letter to Fitzgerald which in she wrote, "I appreciated the chance to meet with Mr. Slowik before he returned to New York. The insight that he gave me into the position only provided me with more incentive to take the job if offered." (Ellerth Dep., p. 347-49, Ex. 5.)

RESPONSE TO STATEMENT NO. 19: Admit. Ellerth adds that since this was her "follow-up" letter to her job interview with Burlington, she obviously wrote only positive things about the interview with Slowik, hoping that this would help her to stand out as a better candidate for the position for which she was applying. (Pl. aff. ¶7.) Ellerth admits that she was enthusiastic and optimistic about the position for which she was interviewing. (Pl. aff. ¶7.) Additionally, Slowik's initial interview of Ellerth was merely the first incident in Slowik's campaign of sexual harassment against her, and Ellerth was still hoping, at this point, that by ignoring Slowik's sexual harassment he might cease such behavior on his own.[9] (Pl. aff. ¶8)

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[9] Sexual harassment undermines a woman's self-esteem, making it less likely that she will complain about the harassment. See, James E. (continued...)

Statement No. 20: The next occasion that Ellerth saw Slowik or spoke with him was in the summer of 1993 when Ellerth travelled to New York for training. Ellerth travelled to New York to meet the Burlington employees with whom she would dealing and to understand their job functions. Ellerth believes she was in New York for one work week, Monday through Friday. (Ellerth Dep., pp. 49-51, 54, 58.)

RESPONSE TO STATEMENT NO. 20: Admit. Ellerth clarifies that she does not recall exactly how long she was in New York, but "believes" it may have been a full Monday-Friday week. (Pl. dep. 54:20-23.)

Statement No. 21: Ellerth does not recall whether she saw Slowik each day she was in New York. Ellerth recalls several conversations with Slowik, most lasting

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(...continued)
Gruber & Lars Bjorn, Women's Responses to Sexual Harassment: An Analysis of Sociocultural Organizational, and Personal Resource Models, 67 Soc.Sci.Q. 814, 817 (1986); Joy A. Livingston, Responses to Sexual Harassment on the Job: Legal, Organizational and Individual Actions, 38 J.Soc.Issues 5, 16 (1982). Women typically try to manage incidents of sexual harassment on their own by ignoring the behavior, avoiding the harasser, or trivializing the incidents in the hope it will put an end to the behavior. Morrison Torrey, We Get the Message: Pornography in the Workplace, 22 Sw.U.L.Rev. 53, note 1 at 69-70 (1992). "Victims who choose to complain know they will have to endure repeated verbalizations of the specific sexual abuse they complain about....Most victims of sexual harassment...never file complaints." Catherine A. MacKinnon, Feminism Unmodified: Discourses on Life and Law, 114 (1987). "The very nature of sexual harassment inhibits its victims from coming forward because of fear of retaliation. Hansel v. Public Serv. Co. of Co., 778 F.Supp. 1126, 1133 (D. Colo. 10. 1991).

about five minutes. Ellerth recalls two conversations that were long in duration. (Ellerth Dep., pp. 56-58.)

RESPONSE TO STATEMENT NO. 21: Admit. Ellerth adds, however, that although she does not recall the exact number of times she saw Slowik while at the New York office, she had "more than five" conversations with him. (Pl. dep. 56:20-57:12.)

Statement No. 22: The first long conversation between Ellerth and Slowik took place in Slowik's office. During the conversation, several people walked in and out of Slowik's office. The conversation focused on the various people and positions in Burlington's New York office. Ellerth claims Slowik told one off-colored joke at the end of the conversation. Ellerth does not recall if others were present when he told the joke, nor could she provide additional details about the joke, its content or context. (Ellerth Dep., pp. 59-65, 65-66.)

RESPONSE TO STATEMENT NO. 22: Admit.[7] Ellerth adds, however, that the people walking in and out of Slowik's office during these conversations were mainly secretaries putting things on or taking things off Slowik's desk. (Pl. dep. 60:7-9.) The "joke" told by Slowik to Ellerth during this

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[7] Plaintiff's case is similar in this respect to Dey v. Colt Constr. Co., 28 F.3d 1446 (7th Cir. 1994), where summary judgment was denied. In Dey, the plaintiff described the circumstances surrounding the majority of the sexual harassment incidents, but only fully recalled five instances of the sexual harassment. Id. at 1449 - 1450.

meeting was "off-colored," "dirty" and "offensive."[8] (Pl. dep. 63:6-8; 66:1-5.)

Statement No. 23: Ellerth claims that Slowik told a total of around four off-colored jokes in the office, including the joke told in the first long conversation. Ellerth does not recall the circumstances or details of the other jokes. (Ellerth Dep., pp. 65-65.)

RESPONSE TO STATEMENT NO. 23: Deny to the extent that Ellerth does recall the circumstances of Slowik's jokes in that they took place during workplace discussions in defendant's New York office and that they were spoken to Ellerth by Slowik when no one else was present. (Pl. dep. 62:19-63:23.) Specifically, Slowik told approximately 5 off-colored, offensive jokes to Ellerth while she was in Slowik's office in New York. (Pl. dep. 63:3-7; 64:2-16; Pl. Ex. B.) In addition, Slowik told one offensive joke to Ellerth during the first long meeting in New York, and "well over 10", or approximately 20, jokes of a sexual nature during the second long meeting. (Pl. dep. 65:11-13; 118:16-21; Pl. Ex. B.)

Ellerth adds that she referred these "jokes" in her deposition as "off-colored," "dirty" and "offensive." (Pl. dep. 63:6-8; 66:1-5.)

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[8] Defendant's purpose in stressing that plaintiff cannot recall details about the sexually offensive joke is obviously to imply that the "joke" was not made and that plaintiff, therefore, is fabricating. This, however, is a question of fact for the jury. When deciding a motion for summary judgment, it is not appropriate to make credibility judgment and thereby determine that the events that plaintiff alleges did or did not happen.

Statement No. 24: The second long conversation Ellerth had with Slowik took place during a lunch meeting at a restaurant near Burlington's office in which Angelo Brenna, the vice president of International Sales for Burlington was also present. The lunch lasted about an hour and one-half during which time Ellerth claims Brenna and Slowik continuously told off-colored jokes. Ellerth does not recall anything else being said during the lunch beside the jokes, nor can she recall any of the jokes that were allegedly told. Brenna and Slowik drank 2 glasses of wine at lunch and Ellerth claims they both appeared intoxicated after the first glass. Ellerth also stated that Slowik and Brenna did not appear intoxicated prior to drinking the wine at lunch. Ellerth claims that Slowik reached over and rubbed her knee while seated at the table for lunch. Ellerth pulled her leg away and said nothing to Slowik or Brenna. Ellerth assumed Brenna did not see the rubbing. (Ellerth Dep., pp. 66-77, 118-19; Slowik Dep., p. 19).

RESPONSE TO STATEMENT NO. 24: Deny to the extent that Ellerth testified that she remembered only Slowik telling jokes "of a sexual nature," not Brenna, but both men were very loud. (Pl. dep. 71:6-8; 70:13-71:8.) Slowik got red in the face and was obnoxious. (Pl. dep. 70:14-15.) Ellerth also adds that "well over 10," or approximately 20, jokes were told at this meeting, and that these "jokes" were "frequent," "constant" and "got more offensive" as the meeting wore on. (Pl. dep. 70:13-71:17; Pl. aff. ¶11.)

Ellerth admits that Slowik reached over and rubbed her knee at the table and that she found this action by Slowik to

be highly offensive and unwelcome. (Pl. dep. 75:9-10; 76:21; Pl. aff. ¶13.)

Statement No. 25: While walking back to the office, Ellerth claims Slowik commented, "you have got great legs, Kim. What do you think, Angelo?" Ellerth believes Brenna responded but she cannot recall. Ellerth was walking about three or four feet in front of Slowik and Brenna. (Ellerth Dep., pp. 78-81.)

RESPONSE TO STATEMENT NO. 25: Deny to the extent that Ellerth testified that Brenna responded but she cannot recall exactly what he said. (Pl. dep. 79:17-22.)

Ellerth adds that as she was walking three or four feet ahead of Slowik and Brenna, she turned back after Brenna's response to Slowik's comment about her legs and saw that Slowik was staring at her legs. (Pl. dep. 80:20-81:6.) Ellerth felt humiliated and degraded by Slowik's comments and actions. (Pl. aff ¶14.) When Ellerth returned to the office after lunch, she told Marilyn (last name unknown), a "sample" person, and Laura Peffal, that Slowik and Brenna had been "very loud and obnoxious and rude and very offensive at lunch." (Pl. dep. 82:23-83:23.)

Statement No. 26: While in New York, Ellerth does not recall another conversation with Slowik after the lunch. (Ellerth Dep., pp. 89-90.)

RESPONSE TO STATEMENT NO. 26: Admit.

Statement No. 27: Ellerth did not see Slowik nor speak with him until approximately one month after the New York trip when she travelled to Greensboro, N.C. for additional training. Ellerth spend one work week in North Carolina, Monday through Friday, travelling around visiting the various factories of Burlington. (Ellerth Dep., pp. 92-96).

RESPONSE TO STATEMENT NO. 27: Deny to the extent that Ellerth merely does not specifically recall seeing or speaking with Slowik until approximately one month after the New York trip in North Carolina. (Pl. dep. 92:23-93:4.) Ellerth testified that Slowik telephoned her prior to the New York and North Carolina trips, and that Slowik included some sexual innuendoes in each such conversation. (Pl. dep. 163:10-13; 131:9-22.)

Statement No. 28: Ellerth first saw Slowik in North Carolina about three days after she arrived while at a dinner in Greensboro. Ellerth had dinner with Slowik, a sales representative named Dan, (Ellerth cannot recall last name) and Dan's wife. Ellerth does not allege any inappropriate conduct toward her at the dinner. However, Ellerth claims Slowik was loud and obnoxious during dinner and gave the waitress a hard time. Ellerth does not recall any details about how Slowik treated the waitress, she just remembers thinking his behavior was very inappropriate and offensive. (Ellerth Dep., pp. 96-105.)

RESPONSE TO STATEMENT NO. 28: Deny to the extent that Ellerth remembers that Slowik's comments to the waitress were "sexually offensive comments." (Pl. dep. 117:21-118:1.)

Statement No. 29: After dinner, Ellerth accompanied Slowik to the bar at the hotel in which they were staying. Slowik alleged commented about the female band members stating that they had nice breasts, nice legs and nice, skimpy outfits. Ellerth claims that regarding the breasts, Slowik questioned "[y]ou are a little lacking in that area, aren't you Kim?" Ellerth did not reply to Slowik regarding any of the comments and she claims that Slowik told her that she "ought to loosen up." At the bar, Slowik allegedly engaged in prolonged looks at Ellerth's breasts and legs. Upon leaving the bar, Ellerth claims Slowik stated that he could make Ellerth's job "very hard or very easy." (Ellerth Dep., pp. 106-115; Ellerth Int. Resp. 10).

RESPONSE TO STATEMENT NO. 29: Admit. Ellerth clarifies that after the business dinner with Dan, Slowik invited Ellerth to the "Fifth Season" which is the lounge of the Four Seasons Hotel where they were staying. (Pl. dep. 106:8-9.) Ellerth felt compelled to accept his invitation since she was on a business trip and Slowik was her supervisor. (Pl. aff. ¶17.) Ellerth further clarifies that what was said to her by Slowik upon leaving the bar was, "You know, Kim, I could make your job very hard or very easy at Burlington," clearly implying that she would have to engage in sexual relations with Slowik in order to succeed in the business.[2/] (Pl. dep. 113:17-20; Pl. aff. ¶22.)

[2/] Slowik's implication that he could make her life at Burlington very hard or very easy depending on whether plaintiff engaged in sexual relations with him was clear to plaintiff (and any reasonable person in her situation) given the totality of the circumstances up to that point, namely Slowik's prior inappropriate comments regarding plaintiff's appearance and her intimate marital relations, his staring at her breasts and legs, and

(continued...)

Statement No. 30: At the dinner and at the hotel bar were the only occasions Ellerth saw Slowik or spoke with him while she was in North Carolina. (Ellerth Dep., p. 116.)

RESPONSE TO STATEMENT NO. 30: Deny to the extent that Ellerth "does not recall" whether she saw or spoke to Slowik again in North Carolina besides at the hotel bar and at dinner. (Pl. dep. 116:8-9.)

Statement No. 31: After her visit to North Carolina, Ellerth claims she began to have conversations with Slowik on the telephone. The conversations were brief, usually Slowik would ask a work-related question and Ellerth would answer. Ellerth estimated that she had these conversations about once every six to eight working days. Ellerth claims there were sexual innuendoes during each and every phone conversation she had with Slowik. Ellerth cannot recall what Slowik said in these conversations, save one time when Slowik allegedly said to Ellerth that it "must be difficult for a woman like you Kim to have a job like that, a woman with great legs." (Ellerth Dep., pp. 131-134, 163-164, 17274, Ellerth Int. Resp. 18.)

RESPONSE TO STATEMENT NO. 31, sentence No. 1: Deny to the extent that Ellerth did not claim that she began having phone conversations with Slowik after North Carolina, but that these communications started happening with more

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(...continued)
his unwelcome and offensive touchings on her knees and rear end. (Pl. aff. ¶22.)

frequency at that time. (Pl. dep. 131:10-12.) Ellerth testified that Slowik was telephoning her even before Ellerth went to New York or North Carolina. (Pl. dep. 163:10-13.)

RESPONSE TO STATEMENT NO. 31, sentence no. 2: Admit.

RESPONSE TO STATEMENT NO. 31, sentence no. 3: Admit. Ellerth adds that she testified in her own words that phone conversations between Slowik and her occurred "once a week" (Pl. dep. 131:1718.)

RESPONSE TO STATEMENT NO. 31, sentence no. 4: Admit.

RESPONSE TO STATEMENT NO. 31, sentence no. 5: Deny. Ellerth does remember what Slowik said in these conversations because she remembers that Slowik made sexual innuendoes in every conversation, and that during some of these conversations, Slowik (1) asked "How are those legs of yours, Kim, ha, ha, ha;" (2) asked whether Ellerth and her husband were still "practicing to have a family;" (3) stated "It must be hard for a woman like you, Kim, to have a job like that, a woman with great legs;" (4) told Ellerth an offensive joke: "What's the difference between a blonde"[10/] and a limo? Not everyone's been in a limo;" (5) in response to a business request from Ellerth, responded "I don't have time for you right now, Kim, unless you tell me what you're wearing;" and (6) asked Ellerth if she was wearing "shorter skirts yet" because that would make her job "a whole heck of a lot easier." (Pl. dep. 131:9-22; 132:9-22; 133:11-13; 171:11-174:17; 253:16-17; 256:2-258:4; Pl. aff. ¶45.)

10/ Plaintiff is blonde.

Statement No. 32: Ellerth next saw Slowik when he visited the Chicago office in the fall of 1993. Ellerth was on the floor folding fabric samples when Slowik walked by with another employee. Slowik allegedly commented, "[o]n your knees again, Kim" as he walked by Ellerth. (Ellerth Dep., pp. 134-136, 139-140).

RESPONSE TO STATEMENT NO. 32, sentence no. 1: Deny. Ellerth saw Slowik "at least one other time" after North Carolina and before the "on your knees again, Kim" episode. (Pl. dep. 130:18-21.) Ellerth understood the "on your knees again, Kim" comment to be a reference to fellatio, which Ellerth found to be degrading and offensive. (Pl. aff. ¶27.)

RESPONSE TO STATEMENT NO. 32, sentence no. 2: Admit.

RESPONSE TO STATEMENT NO. 32, sentence no. 3: Admit.

Statement No. 33: Slowik testified that he has used the phrase "here we are again on our knees" for over 20 years with both male and female employees. (Slowik dep., p. 43.)

RESPONSE TO STATEMENT NO. 33: Admit. Ellerth adds, however, that Slowik stated to her, "on your knees again, Kim" while she had been working on her knees and Slowik was in an upright position, thus rendering an already unequal situation even more degrading and belittling. (Pl. dep. 135:3-136:6; Pl. aff. ¶27.) Slowik did not say "here we

are on our knees again" while they were both on the floor on their knees.[11/] (Pl. dep. 135:3-136:6.)

Statement No. 34: Ellerth claims she saw Slowik during another visit by Slowik to the Chicago office in the fall of 1993. Ellerth alleges that Slowik was making phone calls from her office and when she walked in Slowik commented, "It's nice to have my butt where your butt was." (Ellerth Dep., pp. 140-143.)

RESPONSE TO STATEMENT NO. 34: Admit. Ellerth adds that Slowik was seated in her office on her chair when he made this comment. (Pl. dep. 141:6-8.) In addition, Ellerth's exact words in the deposition were that Slowik said "It's nice to have my butt where your butt was, Kim." (Pl. dep. 140:12-141:8.) Ellerth was made to feel very uncomfortable by Slowik's comment. (Pl. aff. ¶28.)

11/ Plaintiff adds that men and women reasonably view the same conduct or comments differently: "Social life occurs only in social context," and "men and women have unequal positions in a single shared system of social meaning." MacKinnon, Catharine A., Only Words, 48 (1993). Moreover, sexual harassment should be "analyz[ed] from the victim's perspective . . . conduct that many men consider unobjectionable may offend many women." Ellison v. Brady, 924 F.2d 872 at 878-79 (9th Cir. 1991.) "[B]ecause women are disproportionately victims of rape and sexual assault, women have a stronger incentive to be concerned with sexual behavior." Id. "Men and woman are vulnerable in different ways and offended by different behavior." Yates v. AVCO Corp., 819 F.2d 630, 637, n.2 (6th Cir. 1987). "Because of the inequality and coercion with which it is so frequently associated in the minds of women, the appearance of sexuality in an unexpected context or a setting of ostensible equality can be an anguishing experience." Abrams, Gender Discrimination & the Transformation of Workplace Norms, 42 Vand.L.Rev. 1183, 1205 (1989).

Statement No. 35: Ellerth next saw Slowik at the office holiday party in December 1993. About 50 employees and customers attended the party in a restaurant in Rosemont, Illinois. Ellerth claims that Slowik patted her rear as he walked past her during the party. (Ellerth Dep., pp. 146154).

RESPONSE TO STATEMENT NO. 35, sentence no. 1: Deny to the extent that the holiday party in 1993 was "the next specific incident" Ellerth could "specifically recall" after the incident where Slowik commented "It's nice to have my butt where your butt was, Kim." (Pl. dep. 146:17-20; 148:13-16.) There may have been intervening incidents, and there certainly were intervening telephone conversations during which Slowik interjected unwelcome sexual innuendoes. (Pl. aff. ¶29, 30.)

RESPONSE TO STATEMENT NO. 35, sentence no. 2: Admit.

RESPONSE TO STATEMENT NO. 35, sentence no. 3: Admit. Ellerth adds, however, that before Slowik touched her buttocks at the office party, Slowik approached Ellerth's husband, patted him on the shoulder and said, "You are a lucky man to have a woman like that," referring to Ellerth. (Pl. dep. 148:19-24.) Ellerth found this comment to be "offensive," "condescending and sexually offensive." (Pl. dep. 149:22-150:7.) Slowik was looking at Ellerth's buttocks and legs as he made this comment to her husband. (Pl. dep. 150:16-23.)

Statement No. 36: Following the holiday party, Ellerth does not recall seeing Slowik until her promotion

interview in March, 1994. The interview took place in the restaurant of the Marriott Suites in Rosemont, the same location as her initial job interview with Slowik. Ellerth claims that Slowik that he had called her "arrogant" because she was "not loose enough." Ellerth alleges that Slowik reached over and rubbed her knee during the interview, and when discussing the travel associated with the position, Slowik asked, "isn't your husband going to miss you." (Ellerth Dep., pp. 197-202.)

RESPONSE TO STATEMENT NO. 36, sentence no. 1: Deny. "Generally," Ellerth recalls "one or two instances where [Slowik] was out [in Chicago] again" after the holiday party and before her interview with Slowik. (Pl. dep. 158:2-13.) On these occasions, Slowik "would say something to Ellerth or make a comment to" her which would make Ellerth very upset. (Pl. dep. 158:2-13.) In addition, Slowik had a telephone conversation in February or March 1994 in which he responded to Ellerth's business question with "It must be hard for a woman like you, Kim, to have a job like that, a woman with great legs." (Pl. dep. 171:11-174:17.)

RESPONSE TO STATEMENT NO. 36, sentence no. 2: Admit.

RESPONSE TO STATEMENT NO. 36, sentence no. 3: Admit. Ellerth adds that Slowik agreed that he had called her "arrogant" to other persons because she was not "loose enough" for him, and he said this gave him "hesitations" about promoting Ellerth. (Pl. dep. 199:2-200:2.) Ellerth understood that Slowik meant that she was not sexually "loose enough", especially given the context in which Slowik made

this comment (which was followed by Slowik rubbing her knee). (Pl. aff. ¶40.) Ellerth found Slowik's comments to her and his rubbing of her knee during this interview to be highly humiliating, embarrassing, offensive and unwelcome. (Pl. dep. 201:15-20; Pl. aff. ¶41.)

RESPONSE TO STATEMENT NO. 36, sentence no. 4: Admit.

Statement No. 37: Slowik called Ellerth about two weeks later to inform her she got the promotion. Ellerth alleges Slowik made a sexually inappropriate comment during the conversation which caused Ellerth to start crying. Ellerth does not recall what Slowik said. Ellerth also claims that "every time I was on the phone with him I ended up most -- in tears." (Ellerth Dep., pp. 204-207.)

RESPONSE TO STATEMENT NO. 37: Admit.

Statement No. 38: During the last week of March, 1994, Ellerth travelled to San Francisco for a bedding conference. Several Burlington employees, including Slowik, were present. Ellerth spent one work week, Monday through Friday, at the conference. Ellerth did not have contact with Slowik until the last day of the conference. Ellerth also claims that Slowik was ignoring her prior to her last day in San Francisco. At the conference center on Ellerth's last day in San Francisco, Slowik walked by her and allegedly said something about her "ass", although Ellerth does not recall what Slowik said. The comment was the only

contact Ellerth had with Slowik during her week in San Francisco. (Ellerth Dep. pp. 213-217, 225-228, 238-244).

RESPONSE TO STATEMENT NO. 38: Deny to the extent that Ellerth did have contact with Slowik for the entire five days of the conference, and, in fact, "saw him often." (Pl. dep. 215:19216:1.) Slowik, however, openly ignored Ellerth for the first three to four days, a fact which Crosson, Thibideau and a group of sales representatives at dinner acknowledged to Ellerth. (Pl. dep. 213:22-219:20; 222:8-22; 224:1-6.) Ellerth believed Slowik to be ignoring her because she "had not responded favorably to his sexual harassment." (Pl. dep. 244:9-14.) Ellerth adds that on the last day of the conference, Slowik made a "sexually inappropriate" comment to Ellerth about her "ass," which caused; Ellerth to run to the bathroom and cry. (Pl. dep. 225-228; 238244.) As Slowik made this comment to Ellerth, he stopped and stared "in a very sexual way," "for a prolonged period of time at [Ellerth's] back end." (Pl. dep. 246:23-247:10.)

Statement No. 39: After San Francisco, Ellerth next spoke with Slowik during a telephone conversation during the month of April. Ellerth cannot recall when the conversation occurred, or where she was during the conversation. Ellerth claims Slowik made a joke "about blonds, a limo and sex." Ellerth recalls nothing else about the call other than the subjects of the joke. (Ellerth Dep., pp. 252-255.)

RESPONSE TO STATEMENT NO. 39: Deny to the extent that there may have been other telephone conversations between Slowik and Ellerth before April, Ellerth just did not

recall them. (Pl. dep. 252:19-21.) Also, Ellerth did recall when the conversation occurred because she stated it was in April. (Pl. dep. 252:1921.) Ellerth adds that Slowik's "very offensive" "joke" to Ellerth was: "What's the difference between a blonde and a limo? Not everyone's been in a limo." (Pl. dep. 252:19-21; Pl. aff. ¶45.)

Statement No. 40: Ellerth claims she had two telephone conversations with Slowik in May 1994 pursuant to her attempt to obtain permission from Slowik to do a special project for a customer. During the first conversation, Slowik allegedly told Ellerth he did not have time for her unless she told him what she was wearing. Slowik denied Ellerth permission for the project in the second conversation and allegedly asked Ellerth if she was "wearing shorter skirts yet...because it would make your job a whole heck of a lot easier." (Ellerth Dep., pp. 255-258, 264-270.)

RESPONSE TO STATEMENT NO. 40: Admit. Ellerth adds that when she initially called an employee named Rich (last name unknown) for this permission, he told her she had to speak to Slowik to receive it. (Pl. dep. 263:20-264:4.)

Statement No. 41: Ellerth was aware throughout her employment that Burlington maintained a policy against sexual harassment. (Ellerth Dep., p. 358.)

RESPONSE TO STATEMENT NO. 41: Deny. While Ellerth knew there was a policy against sexual harassment in the employee handbook, she was not aware of whether it was being enforced, whether it was in effect throughout her

employment, or who to complain to should she experience a problem with sexual harassment. (Pl. dep. 358:6-359:1; Pl. aff. ¶49.)

Statement No. 42: Ellerth received a copy of Burlington's employee handbook and read the policy against sexual harassment in the handbook. (Ellerth Dep., pp. 358-59; Handbook p. 3.)

RESPONSE TO STATEMENT NO. 42: Admit.

Statement No. 43: Ellerth chose not to inform her supervisors or anyone in authority regarding Slowik's conduct because her husband advised her not to say anything to anyone because it would jeopardize her job. Ellerth and her husband believed her job would be in jeopardy based on stories they heard on the news and his alleged experiences at Sears, Roebuck & Co. None of either Ellerth's or her husband's beliefs had anything to do with Burlington. (Ellerth Dep., pp. 308-09, 358-62.)

RESPONSE TO STATEMENT NO. 43, sentence no. 1: Admit. Ellerth adds, moreover, that she did not need to "inform" Angelo Brenna, defendant's vice president of international sales, of Slowik's sexually harassing conduct since such conduct took place in front of Brenna. (See defendant's 12M statement, Nos. 24 and 25.)

RESPONSE TO STATEMENT NO. 43, sentence no. 2: Deny. Ellerth and her husband did not believe her job was in jeopardy "based on stories they heard on the news and her

husband's alleged experiences at Sears, Roebuck & Co." (Pl. dep. 361:2-362:14; Pl. aff. ¶50.) Ellerth testified that her husband thought her job would be in jeopardy if she complained about the sexual harassment because "it would be very easy for [Slowik] or anyone else to find reasons to make [her] job more difficult or to fire [her]." (Pl. dep. 361:2-11.) Ellerth's comment that stories of sexual harassment are "all over the news every day" was meant to convey merely that she believed that situations of sexual harassment and retaliation for complaining about sexual harassment are common occurrences in our society and a matter of common sense. (Pl. aff. ¶51.)

RESPONSE TO STATEMENT NO. 43, sentence no. 3: Deny to the extent that Ellerth's and her husband's opinions had to do with Burlington in the sense that Ellerth felt that her job was being implicitly threatened by Slowik at Burlington, given Slowik's statements to her that he could "make her life very hard or very easy at Burlington," implying that she would have to engage in sexual relations with him in order to succeed at Burlington. (Pl. dep. 113:17-20; Pl. aff. ¶22.) In response to defendant's question, "Did Ted Slowik ever threaten your job?" Ellerth answered "by [Slowik's] sexual harassment [her] job was indeed threatened." (Pl. dep. 308:9-20.)

Statement No. 44: Ellerth never informed Fitzgerald about Slowik's conduct while she was employed at Burlington. (Ellerth Dep., pp. 46, 91, 121, 143, 153, 158, 174-75, 20708).

RESPONSE TO STATEMENT NO. 44: Admit.

Statement No. 45: Ellerth never informed Lawrence about Slowik's conduct while she was employed at Burlington. Ellerth stated she chose not to inform Lawrence because "it would be his duty as my supervisor to report any incidents of sexual harassment." (Ellerth Dep., pp. 357-358.)

RESPONSE TO STATEMENT NO. 45, sentence no. 1: Admit.

RESPONSE TO STATEMENT NO. 45, sentence no. 2: Deny to the extent that Ellerth testified that she did not tell Lawrence because "at the time [she] was still employed with Burlington and [she] did not want [her] job to be in jeopardy" and she felt that telling Lawrence would place her job in jeopardy, or, in the best-case scenario, make her job much more difficult at Burlington. (Pl. dep. 357:23-358:2; 355:13-20.)

Statement No. 46: Ellerth claims that during her employment she told several employees of Burlington and one Burlington customer that she was being harassed by Slowik. Ellerth admits that none of the employees were her superiors. In fact, the highest level employee ellerth claims to have informed about Slowik's conduct was a sales representative, the same position Ellerth held after her promotion. (Pl. Dep., pp. 175-90, 350-55.)

RESPONSE TO STATEMENT NO. 46, sentence no. 1: Admit.

RESPONSE TO STATEMENT NO. 46, sentence no. 2: Admit.

RESPONSE TO STATEMENT NO. 46, sentence no. 3: Deny. The highest level employee Ellerth complained to about Slowik's sexual harassment was Donna Thibideau, defendant's customer service manager, after January 1994 and before March 15, 1994. (Pl. dep. 176:8-177:1; 179:22-180:3). It was during this conversation that Thibideau informed Ellerth that Ann Pillow may also have been harassed by Slowik. (Pl. dep. 178:1-3.)

In addition, defendant's vice president of internal sales, Angelo Brenna, actually witnessed some of Slowik's sexual harassment. (See defendant's 12M statement Nos. 24 and 25.)

In addition, Ellerth complained about sexual harassment by Slowik to: Sherry Hester, customer service representative; Brent Schneider, sales representative; Patrick Crosson, sales representative; Marilyn (last name unknown), "sample" person; Laura Peffal, customer service representative; and Cara Jiminez, from Spring Air. (Pl. dep. 350:6-351:2-14; Jiminez aff. ¶2-5.)[12/]

Statement No. 47: Ellerth claims that she complained to her husband and her parents that Slowik sexually harassed her as the conduct occurred.

12/ References of "Jiminez aff. ¶___" are references to the affidavit of Cara Jiminez, attached as Pl. Ex. H to the appendix to plaintiff's answer brief.

RESPONSE TO STATEMENT NO. 47: Admit. Ellerth's husband and mother testified that she discussed Slowik's sexual harassment of her on numerous occasions with them. (S. Ellerth dep. 15:3-19:5; 24:5-9; 25:21-26:16; 30:4-34:1; 39:12-40:16; 41:5-48:15; 57:16 59:7; 70:12-72:22; 75:3-77:2; 78:14-87:11; 90:2-92:3; B. Harac dep. 6:12-22; 9:16; 13:22-14:19; 15:19-25:22.)[13/]

Statement No. 48: Ellerth claims that on one occasion she told Slowik that what he said was inappropriate. Ellerth does not recall where or when she told Slowik that what he was saying was inappropriate. Further, Ellerth does not recall whether she said it to Slowik in person or over the telephone. Nor does Ellerth recall what Slowik said that prompted her response. Ellerth does recall that no one else was present. (Ellerth Dep., pp. 143-46.)

RESPONSE TO STATEMENT NO. 48: Deny to the extent that Ellerth recalls that the context of her complaint to Slowik about his sexual harassment was after he made an "embarrassing and humiliating sexual innuendo" to Ellerth. (Pl. dep. 143:23145:12.) This complaint had no effect whatsoever on Slowik's behavior. (Pl. dep. 143:23-145:12.) In addition, the time of Ellerth's complaint to Slowik was placed by the Ellerth as occurring between March 1993 and Fall 1993. (Pl. dep. 143:23-145:12.)

13/ References to "S. Ellerth dep. ___" are references to portions of the deposition of Steve Ellerth, attached as Pl. Ex. F to the appendix to plaintiff's answer brief.

References to "B. Harac dep. ____" are references to portions of the deposition of Barbara Harac, attached as Pl. Ex. G to the appendix to plaintiff's answer brief.

Respectfully submitted,

/s/ Margaret A. Zuleger
Margaret A. Zuleger

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Attorney for Plaintiff

Dated: October 19, 1995
Chicago, Illinois

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the within and foregoing document was served by hand on October 19, 1995, before 5:00 p.m., upon the attorneys for defendant at their address of record.

/s/ Margaret A. Zuleger
Margaret A. Zuleger

STATE OF ILLINOIS)
)
COUNTY OF COOK)

AFFIDAVIT OF KIMBERLY B. ELLERTH

I, KIMBERLY B. ELLERTH, being first duly sworn upon oath, state that I have personal knowledge of, and am competent and capable to testifying to, the following facts:

1. I am the plaintiff in the case of Kimberly B. Ellerth v. Burlington Industries Inc., Case No. 95 C 0839, now pending in the United States District Court for the Northern District of Illinois.

2. Pl. Ex. B accurately summarizes the sexual harassment that I experienced while working for defendant Burlington Industries, Inc. (hereinafter "defendant").

3. In or around March 1993, during the my initial job interview at Burlington with Ted Slowik, defendant's vicepresident of sales and marketing (hereinafter "Slowik"), Slowik asked me on one occasion if I was planning on having a family with my husband.

4. In or around March 1993, during the initial job interview with Slowik, Slowik asked me on one occasion if I was "practicing" to have a family, which I understood to clearly imply having intimate sexual relations with my husband.

5. In or around March 1993, during my initial job interview at Burlington with Slowik, Slowik stared at my breasts on approximately three (3) occasions for "constant" and "prolonged periods of time."

6. In or around March 1993, during my initial job interview at Burlington with Slowik, Slowik stared at my legs on approximately ten (10) occasions for "constant" and "prolonged periods of time."

7. I sent a "follow-up" letter after my initial job interview with Burlington to Fitzgerald, in which I wrote only positive things about the interview with Slowik, hoping that this would help me to stand out as a better candidate for the position for which I was applying. I was enthusiastic and optimistic about the position at Burlington for which I was interviewing.

8. A reason I did not complain about Slowik's offensive behavior during his initial interview of me in the "follow-up" letter that I sent was because Slowik's initial interview of me was merely the first incident in Slowik's campaign of sexual harassment against me and I was still hoping, at that point, that by ignoring Slowik's sexual harassment he might cease such behavior on his own.

9. At defendant's Manhattan, New York offices, in or around the summer of 1993, Slowik had approximately five (5) conversations with me that were not work-related, e.g., he told "off-colored, offensive" jokes when I was alone with him in his office in New York.

10. At defendant's Manhattan, New York offices, in or around the summer of 1993, Slowik told one offensive joke to me during the first long meeting.

11. In or around the summer of 1993, during a business meeting at an Italian restaurant in Manhattan, New York, with another of defendant's vice-presidents, Angelo Brenna, Slowik told approximately twenty (20) jokes of a sexual nature (e.g., about breasts and various sex acts).

12. In or around the summer of 1993, during a business meeting at an Italian restaurant in Manhattan, New York, with vice-president Brenna, Slowik on one occasion reached over and rubbed my knee under the table, causing me to pull my knee away.

13. I found Slowik's reaching over and rubbing of my knee with his hand under the table at the business meeting at an Italian restaurant in Manhattan, New York, to be highly offensive and unwelcome.

14. In or around the summer of 1993, on the walk back to the office from the Italian restaurant in Manhattan, New York, Slowik made the comment to me and to vice-president Brenna "you've got great legs, Kim. What do you think, Angelo?" on one occasion as I was walking three to four feet ahead of Slowik and Brenna and as Slowik was staring at my legs. I felt humiliated and degraded by Slowik's comment, "you've got great legs, Kim. What do you think, Angelo?" and Slowik's staring at my legs as he made this comment, during the walk back to the offices after the second business meeting in New York.

15. While I was in defendant's Greensboro, North Carolina location for training, in or around the summer of 1993, Slowik made five to seven "obnoxious" and "sexually offensive" comments to the waitress at a restaurant, during a business dinner with Dan (last name unknown), Dan's wife and me.

16. While I was in Greensboro, North Carolina for training, in or around the summer of 1993, Slowik invited me to a lounge at the Four Seasons Hotel on one occasion after the business meeting.

17. I felt compelled to accept Slowik's invitation to the "Fifth Season", the lounge of the Four Seasons Hotel in New York, since I was on a business trip and Slowik was my supervisor.

18. In Greensboro, North Carolina, in or around the summer of 1993, Slowik made comments to me about the all-woman band in the lounge of the hotel; he commented two times on what nice breasts they had, two times on what nice legs they had, and five or more times that the skimpy outfits they were wearing were nice.

19. In Greensboro, North Carolina, in or around the summer of 1993, after telling me he thought the band-members in the lounge of the Four Seasons Hotel had nice breasts, Slowik turned to me and said to me "You are a little lacking in that area, aren't you, Kim?" one time, which I understood to be in reference to my breasts.

20. In Greensboro, North Carolina, in or around the summer of 1993, at the lounge in the Four Seasons Hotel,

Slowik told me one time that I should "loosen up," after I did not respond positively to his sexually offensive remarks.

21. In Greensboro, North Carolina, in or around the summer of 1993, in the lounge outside of the Four Seasons Hotel, before departing, Slowik said to me one time, "You know, Kim, I could make your life very hard or very easy at Burlington."

22. I understood Slowik's comment, "you know, Kim, I could make your job very hard or very easy at Burlington," as clearly implying that I would have to engage in sexual relations with Slowik in order to succeed in the business. Slowik's implication that he could make my life at Burlington very hard or very easy depending on whether I engaged in sexual relations with him was clear to me given the totality of the circumstances up to that point, namely Slowik's prior inappropriate comments regarding my appearance and my intimate marital relations, his staring at my breasts and legs, and his unwelcome and offensive touchings on my knees.

23. In Greensboro, North Carolina, in or around the summer of 1993 in the lounge of the Four Seasons Hotel, Slowik stared at me in a sexual way, including approximately two prolonged looks at my breasts and approximately five prolonged looks at my legs.

24. Slowik made approximately 40 sexual innuendoes in phone conversations with me after I returned from training in North Carolina, such as "How are those legs of yours, Kim, ha, ha, ha" or "How are your legs, Kim?"

25. Slowik asked me over the phone on one occasion if my husband and I were still "practicing to have a family."

26. In or around October 1993, at defendant's 333 West Wacker Drive location in Chicago, Illinois, while I was in the sample room folding fabric samples on the floor, Slowik walked by and said "On your knees again, Kim" on one occasion.

27. I understood Slowik's "on your knees again, Kim" comment in October 1993, made while I was on the floor on my knees and Slowik was in an upright position, to be a reference to fellatio. I found this comment degrading and offensive, and found that it rendered an already unequal situation even more degrading and belittling.

28. When Slowik was in town for another client meeting in Fall 1993 at defendant's 333 West Wacker location, he sat in my chair and desk in my office to make his phone calls and told me on one occasion, "It's nice to have my butt where your butt was, Kim." I was made to feel very uncomfortable when Slowik commented that, "it's nice to have my butt where your butt was, Kim" while he was seated in my chair in my office.

29. I recall one or two additional during the time from March 1993 to December 1993, which I cannot recall the specifics of, where Slowik made sexually harassing comments to me.

30. There were intervening telephone conversations between the "it's nice to have my butt where your butt was, Kim" comment and the holiday party, during which Slowik interjected unwelcome sexual innuendoes.

31. At the holiday party in or around December 1993, Slowik came up to my husband, patted him on the shoulder and said on one occasion, "You are a lucky man to have a woman like that," referring to me, as Slowik looked at my legs and buttocks.

32. At the holiday party in or around December 1993, Slowik walked by me and touched my buttocks on one occasion within my husband's view.

33. In a telephone conversation in or around February or March 1994, when I asked Slowik about a customer, he replied, "It must be hard for a woman like you, Kim, to have a job like that, a woman with great legs" on one occasion.

34. Between January 1994 and March 15, 1994, Donna Thibideau from Burlington, North Carolina, told me one time during a phone conversation that a former woman employee named Ann Pillow may have been sexually harassed by Slowik, too.

35. Between January 1994 and March 15, 1994, Patrick Crosson told me approximately three or four times that Slowik had told Crosson that Slowik did not want me to be promoted because I was "arrogant".

36. Between January 1994 and March 15, 1994, Slowik also told Pat Lawrence on one occasion that I was "arrogant".

37. During my job interview with Lawrence for a promotion in or around February 1994, Lawrence told me on one occasion that Slowik "called [me] arrogant."

38. Pat Lawrence said to me on one occasion that the decision about whether to promote me was made difficult for him because Slowik had a say in it.

39. On or about March 15, 1994, during my interview with Slowik for a promotion, Slowik reach over on one occasion and rubbed my knee with his hand.

40. On or about March 15, 1994, at the Marriott Suites, Des Plaines, Illinois, at my interview with Slowik for a promotion, Slowik said to me on one occasion that he had hesitations about having me in the position offered because I was not "loose enough" for him. I understood Slowik's statement that I was not "loose enough" for him to mean that I was not sexually "loose enough" for him, especially given the context in which Slowik made this comment (which was followed by Slowik rubbing my knee).

41. I found Slowik's comments to me and his rubbing of my knee during my interview with him for a promotion to be highly humiliating, embarrassing, offensive and unwelcome.

42. On or about March 15, 1994, during my interview with Slowik for a promotion, Slowik told me approximately four times that the new job was hard work, and I would be travelling a lot and he said "isn't your husband going to miss you?"

43. After March 15, 1994, during a telephone conversation, Slowik made approximately one sexually inappropriate comment to me and told me one time, "you're gonna be out there with men who work in factories, and they

certainly like women with pretty butts/legs". I cried after this phone call.

44. While I was in San Francisco for training, Slowik said something sexually inappropriate to me about my body approximately one time, about my "ass," specifically. As a result, I ran to the bathroom and cried. As Slowik made the inappropriate comment about my "ass" in San Francisco, he stopped and was stared at my back end.

45. The very offensive "joke" that Slowik told me in the telephone conversation he had with me in or around April 1994 was: "What's the difference between a blonde and a limo? Not everyone's been in a limo."

46. In another telephone conversation in or around April or May 1994, on one occasion when I made a business inquiry to Slowik about whether I could get special permission to put a customer's logo into the fabric, Slowik said, "I don't have time for you right now, Kim, unless you tell me what you're wearing." In or around May 1994, when I called Slowik back because I did not get a response to my question the first time, Slowik told me "No," I did not have special permission to do the special request for the customer, and asked me on this occasion if I was wearing shorter skirts yet because that would make my job "a whole heck of a lot easier."

47. According to Lawrence and Thibideau, Lawrence and Thibideau only received complaints about me not returning some telephone calls, and these were received from only one or two customers and employees.

48. In addition to sending a fax to Lawrence at the end of my employment with Burlington, I mailed a letter to Lawrence, dated June 21, 1994, which described the sexual harassment by Slowik. (P1. Ex. C.)

49. While I knew there was a policy against sexual harassment in the employee handbook, I was not aware of whether it was being enforced, whether it was in effect throughout my employment, or who to complain to should I experience a problem with sexual harassment.

50. My husband and I did not believe my job was in jeopardy "based on stories [we] heard on the news and [my] husband's alleged experiences at Sears, Roebuck & Co." My husband and I thought my job would be in jeopardy if I complained about the sexual harassment because it would be very easy for Slowik or anyone else to find reasons to make my job more difficult or to fire me.

51. My comment in my deposition, p. 309, that stories of sexual harassment are "all over the news every day" was meant to convey merely that I believed that situations of sexual harassment and retaliation for complaining about sexual harassment are common occurrences and of common knowledge in our society.

s/Kimberly B. Ellerth
KIMBERLY B. ELLERTH

SUBSCRIBED and SWORN TO before me this October 17, 1995.

s/Dina M. Cavico
NOTARY PUBLIC

KIMBERLY B. ELLERTH v.
BURLINGTON INDUSTRIES, INC.

CASE NO. 95 C 0839

SUMMARY OF SEXUAL HARASSMENT BY TED SLOWIK

COMMENT OR INCIDENT	NUMBER OF COMMENTS OR INCIDENTS
In or around March 1993, during the plaintiff's initial job interview with defendant's vice president of sales and marketing, Ted Slowik (hereinafter "Slowik"), asked if Ellerth was planning on having a family with her husband. (Pl. dep. 25:3-8.)	1 (Pl. aff. ¶3)
In or around March 1993, during the initial job interview with Slowik, Slowik asked if Ellerth was "practicing" to have a family, implying having sex with her husband. (Pl. dep. 28:2-10.)	1 (Pl aff. ¶4)

In or around March 1993, during the initial job interview, Slowik stared at Ellerth's breasts for "constant" and "prolonged periods of time." (Pl. dep. 87:15-24; 85:13-15.)	3 (Pl. aff. ¶5)
In or around March 1993, during the initial job interview, Slowik stared at Ellerth's legs for "constant" and "prolonged periods of time." (Pl. dep. 87:15-25; 85:13-15.)	10 (Pl. aff. ¶6)
At defendant's Manhattan, New York offices, in or around the summer of 1993, Slowik had many conversations with Ellerth that were not work- related, e.g., he told "off-colored, offensive" jokes when she was alone with him in his office in New York. (Pl. dep. 63:3-7; 64:2-16.)	5 (Pl. aff. ¶9)
At the Manhattan, New York offices, in or around the summer of 1993, Slowik told one offensive joke during the first long meeting; (Pl. dep. 65:11-12.)	1 (Pl. aff. ¶10)

In or around the summer of 1993, at an Italian restaurant in Manhattan, New York, Slowik told several jokes of a sexual nature during the second long meeting (luncheon); Angelo Brenna, defendant's vice president of international sales, who worked for Burlington, was also present. Slowik was telling jokes about "breasts, sex acts - along those lines." (P1. dep. 65:12-13; 71:3-4; 68:8-11; 69:3-13:118:16-21.)	20 (Pl. aff. ¶11)
In or around the summer of 1993, at an Italian restaurant in Manhattan, New York, in the presence of vice president Brenna, Slowik reached over and rubbed Ellerth's knee under the table during the luncheon meeting, causing Ellerth to pull her knee away. (P1. dep. 75:9-10; 76:21.)	1 (Pl. aff. ¶12)

In or around the summer of 1993, on the walk back to the office from the Italian restaurant in Manhattan, New York, Slowik said to Ellerth and vice president Brenna, "You have got great legs, Kim. What do you think, Angelo?" as she was walking 3 - 4 feet ahead of them. Ellerth saw that Slowik was staring at her legs as he made this comment. (P1. dep 80:20-81:6.)	1 (Pl. aff. ¶14)
In Greenboro, North Carolina, in or around the summer of 1993, Slowik made "obnoxious" and "sexually offensive" comments to the waitress at a restaurant, where he and Ellerth were attending a business meeting with a Burlington employee, Dan (last name unknown) and Dan's wife. Ellerth was very offended and embarrassed by these comments. (P1. dep. 102:12-105:13; 117:21-118:1.)	5-7 (Pl. aff. ¶15)
In Greensboro, North Carolina, in or around the summer of 1993, Slowik invited Ellerth to a lounge at the hotel they were staying in on the business trip (Four Seasons) after their business meeting. (P1. dep. 106:8-11.)	1 (P1. aff. ¶16)

In Greensboro, North Carolina, in or around the summer of 1993, Slowik made comments to Ellerth about the all-woman band in the lounge of the hotel where Slowik and Ellerth were staying, including what nice breasts they had. (P1. dep. 109:3-6.)	2 (Pl. aff. ¶18)
In Greensboro, North Carolina, in or around the summer of 1993, Slowik made comments to Ellerth about the all-woman band in the lounge of the hotel where Slowik and Ellerth were staying, including what nice legs they had. (P1. dep. 109:3-6.)	2 (Pl. aff. ¶18)
In Greensboro, North Carolina, in or around the summer of 1993, Slowik made comments to Ellerth about the all-woman band in the lounge of the hotel where Slowik and Ellerth were staying, including that their skimpy outfits were nice. (P1. dep. 109:3-6.)	5+ (Pl. aff. ¶18)

In Greensboro, North Carolina, in or around the summer of 1993, after telling Ellerth he thought the band-members in the lounge of the Four Seasons Hotel had nice breasts, Slowik turned to Ellerth and said "You are a little lacking in that area, aren't you, Kim?", referring to the Ellerth's breasts. Ellerth was very humiliated and offended by this comment. (P1. dep. 109:3-10.)	1 (P1. aff. ¶19)
In Greensboro, North Carolina, in or around the summer of 1993, at the lounge in the Four Seasons Hotel, Slowik told Ellerth that she should "loosen up," after she did not respond to his sexually offensive remarks. (P1. dep. 111:3-5.)	1 (Pl. aff. ¶20)
In Greensboro, North Carolina, in or around the summer of 1993, in the lounge outside of the Four Seasons Hotel, before departing, Slowik said to Ellerth, "You know, Kim, I could make your life very hard or very easy at Burlington." (P1. dep. 113:17-20.)	1 (Pl. aff. ¶21)

In Greensboro, North Carolina, in or around the summer of 1993 in the lounge of the Four Seasons Hotel, Slowik stared at Ellerth in a sexual way, including prolonged looks at her breasts. (P1. dep. 114:10-19.)	2 (Pl. aff. ¶23)
In Greensboro, North Carolina, in or around the summer of 1993 in the lounge of the Four Seasons Hotel, Slowik stared at Ellerth in a sexual way, including prolonged looks at her legs. (P1. dep. 114:10-19.)	5 (Pl. aff. ¶23)
Slowik made sexual innuendoes in all phone conversations with Ellerth after she returned from training in North Carolina, such as "How are those legs of yours, Kim, ha, ha, ha" or "How are your legs, Kim?" (P1. dep. 132:9-22.)	40 (Pl. aff. ¶24)
Slowik asked Ellerth over the phone if she and her husband were still "practicing to have a family." (P1. dep. 133:11-13.)	1 (Pl. aff. ¶25)

In or around October 1993, at defendant's 333 West Wacker Drive location in Chicago, Illinois, while Ellerth was in the sample room for a meeting with a client folding fabric samples on the floor, Slowik walked by and said "On your knees again, Kim." (P1. dep. 135:3-136:6.)	1 (Pl. aff. ¶26)
When Slowik was in town for another client meeting in Fall 1993 at the 333 West Wacker location, he used Ellerth's chair and desk in her office to make his phone calls and told Ellerth, "It's nice to have my butt where your butt was, Kim." (P1. dep. 140:12-141:8.)	1 (Pl. aff. ¶28)
Ellerth recalls 1-2 more incidents during the time from March 1993 to December 1993, which she cannot recall the specifics of, where Slowik made sexually harassing comments to her.	1-2 (Pl. aff. ¶29)

At the holiday party in or around December 1993, Slowik came up to Ellerth's husband, patted him on the shoulder and said, "You are a lucky man to have a woman like that," referring to Ellerth. Slowik was looking at Ellerth's legs and buttocks when he made this comment. (P1. dep. 146:19-147:21; 148:19-24; 150:16-23.)	1 (Pl. aff. ¶31) 1 (Pl. aff. ¶31)
At the holiday party in or around December 1993, Slowik walked by Ellerth and touched his hand to her buttocks within the Ellerth's husband's view. (P1. dep. 151:24-152:1.)	1 (Pl. aff. ¶32)
In a telephone conversation in or around February or March 1994, when Ellerth asked Slowik about a customer, he replied, "It must be hard for a woman like you, Kim, to have a job like that, a woman with great legs." (P1. dep. 171:11-174:17.)	1 (Pl. aff. ¶33)

Between January 1994 and March 15, 1994, Donna Thibideau from Burlington, North Carolina, told Ellerth during a phone conversation that a former woman employee named Ann Pillow may have been sexually harassed by Slowik, too. (P1. dep. 177:22-178:3.)	1 (Pl. aff. ¶34)
Between January 1994 and March 15, 1994, Patrick Crosson told Ellerth that Slowik had told Crosson that Slowik did not want Ellerth to be promoted because she was "arrogant." (P1. dep. 187:20-24; 188: 18-19.)	3-4 (Pl. aff. ¶35)
Between January 1994 and March 15, 1994, Slowik also told Pat Lawrence that Ellerth was "arrogant". (P1. dep. 188:15-19.)	1 (Pl. aff. ¶36)
During Ellerth's job interview with Pat Lawrence for a promotion in or around February 1994, Lawrence told Ellerth that Slowik "called her arrogant." (P1. dep. 195:4-11.)	1 (Pl. aff. ¶37)

Pat Lawrence said that the decision about whether to promote the Ellerth was made difficult for him because Slowik had a say in it. (P1. dep. 312:11-13.)	1 (Pl. aff. ¶38)
On or about March 15, 1994, at the Marriott Suites, Des Plaines, Illinois, at Ellerth's interview with Slowik for a promotion, Slowik said that he had hesitations about having Ellerth in the position offered because she was not "loose enough" for him. (P1. dep. 199:2-200:2.)	1 (Pl. aff. ¶40)
On or about March 15, 1994, during Ellerth's interview with Slowik for a promotion, Slowik reach over and rubbed Ellerth's knee with his hand. (P1. dep. 200:3-4.)	1 (Pl. aff. ¶39)
On or about March 15, 1994, during Ellerth's interview with Slowik for a promotion, Slowik told Ellerth that the new job was hard work, and Ellerth would be travailing a lot and said "isn't your husband going to miss you?" (P1. dep. 200:12-15.)	3 (Pl. aff. ¶42)

After March 15, 1994, Slowik called Ellerth to hire her and tell her she had an option between two (2) jobs. Slowik then made a sexually inappropriate comment to Ellerth and told Ellerth, "you're gonna be out there with men who work in factories, and they certainly like women with pretty butts/legs". Ellerth cried after the phone call. (P1. dep. 204:17-207:2; P1. aff. ¶43.)	1 (Pl. aff. ¶43)
After receiving her new promotion, when Ellerth traveled to San Francisco to be trained for her new position, Slowik at first ignored her and did not even say hello to her for 3-4 days. (P1. dep. 216:5-7.)	1 (Pl. aff. ¶

Later, still in San Francisco, Slowik said something sexually inappropriate to her about her body, about her "ass," specifically. As a result, Ellerth ran to the bathroom and cried. (Pl. dep. 216:8-9; 226:2-5; 238:22-239:15.) As Slowik said this he stopped and was staring at Ellerth's back end. (Pl. dep. 247:6-24.)	1 (Pl. aff. ¶44) 1 (Pl. aff. ¶44)
In a telephone call in or around April 1994, Slowik told Ellerth a very offensive joke about blonds, a limo, and sex: "What's the difference between a blonde and a limo? Not everyone's been in a limo." (Pl. dep. 253:16-17; Pl. aff. ¶45.)	1 (Pl. aff. ¶45)
In another telephone conversation in or around April or May 1994, when Ellerth made a business inquiry to Slowik about whether she could get special permission to put a customer's logo into the fabric, Slowik responded, "I don't have time for you right now, Kim, unless you tell me what you're wearing." (Pl. dep. 256:2-257:5.)	1 (Pl. aff. ¶46)

In or around May 1994, when Ellerth called Slowik back because she did not get a response to her question the first time, Slowik told her "No," she did not have special permission to do the special request for the customer, and asked her if she was wearing shorter skirts yet because that would make her job "a whole heck of a lot easier." (Pl. dep. 257:8-258:4.)1	1 (Pl. aff. ¶46)
Ellerth resigned her position at Burlington on or about May 30, 1994, within 1-2 weeks after this conversation. (Pl. dep. 273:9-23.)	
TOTAL	139

Supreme Court, U.S.
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No. 97-569

In the Supreme Court of the United States
OCTOBER TERM, 1997

BURLINGTON INDUSTRIES, INC.,
Petitioner,

v.

KIMBERLY B. ELLERTH,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

BRIEF FOR PETITIONER BURLINGTON INDUSTRIES, INC.

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46 pp

QUESTION PRESENTED

Whether a claim of *quid pro quo* sexual harassment may be stated under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, *et seq.*, where the plaintiff employee has neither submitted to the sexual advances of the alleged harasser nor suffered any tangible effects on the compensation, terms, conditions or privileges of employment as a consequence of a refusal to submit to those advances.

LIST OF PARTIES

The proceeding in the United States Court of Appeals for the Seventh Circuit, whose judgment is sought to be reviewed, consisted of two proceedings, Nos. 95-3128 and 96-1361, which were consolidated by the Court of Appeals for purposes of decision.

The following persons and entities are now before the Court and were parties to the proceedings indicated:

Petitioner: Burlington Industries, Inc.* (No. 96-1361)

Respondent: Kimberly B. Ellerth (No. 96-1361)

The following persons and entities were parties to the proceedings indicated:

Alice Jansen (No. 95-3128); Packaging Corporation of America (No. 95-3128)

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* Pursuant to Supreme Court Rule 29.1, Petitioner Burlington Industries, Inc. states that it has no parent or subsidiary corporations, other than wholly-owned subsidiaries.

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Stacey Dansky, *Eliminating Strict Employer Liability In Quid Pro Quo Sexual Harassment*, 76 Tex. L. Rev. 435, 439 (1997) 18

Rachel E. Lutner, *Employer Liability For Sexual Harassment: The Morass Of Agency Principles And Respondeat Superior*, 3 Univ. Ill. L. Rev. 589 (1993) 18

Michael J. Phillips, *Employer Sexual Harassment Liability Under Agency Principles: A Second Look At Meritor Savings Bank, FSB v. Vinson*, 44 Vand. L. Rev. 1229 (1991) 18

J. Hoult Verkerke, *Notice Liability In Employment Discrimination Law*, 81 Va. L. Rev. 273 (1995) 18, 23

OPINIONS BELOW

The en banc opinion of the court of appeals, Pet. App. 1a-208a, is reported at 123 F.3d 490. The panel opinion of the court of appeals, Pet. App. 209a-241a, is reported at 102 F.3d 848. The opinion of the district court, Pet. App. 241a-287a, is reported at 912 F. Supp. 1101.

JURISDICTION

This Court has jurisdiction to review the judgment in question by writ of certiorari under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This case concerns Section 703(a)(1) of Title VII of the Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 253, 255, which provides:

> It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a)(1).

STATEMENT OF THE CASE

A. Underlying Facts[1]

Kimberly Ellerth resigned from Burlington Industries in May 1994, informing Burlington that she had taken a new job. Since resigning, Ellerth has claimed that, during her fifteen months of employment with Burlington, she was sexually harassed by Theodore Slowik, a vice president of one of Burlington's divisions. Ellerth, who admitted that she was aware of Burlington's policy prohibiting sexual harassment during her employment, and admitted that she had received and read Burlington's employee handbook which contained this policy, as well as Burlington's grievance procedures, chose not to complain to her supervisors or anyone in the human resources department about the alleged harassment until after she quit her job. J.A. 10-14, 109-112, Pet. App. 271a-272a.

Burlington is a manufacturer of textiles and home furnishings which employs over 22,000 people and operates more than 50 plants and offices around the United States. J.A. 117. Burlington hired Ellerth in March of 1993 as a merchandising assistant in the Chicago office after she interviewed with Mary Strenk Fitzgerald, a National Accounts Manager in Burlington's Mattress Fabric (or "Ticking") Division, and Slowik, who holds the position of Vice-President of Sales and Marketing for Burlington's House Mattress Ticking Division and who works out of Burlington's New York office. J.A. 118-120. Approximately one week after her

[1] These facts are taken from Burlington's motion for summary judgment. While Burlington contests Ellerth's allegations of sexual harassment, for purposes of the summary judgment and appeal they have been considered as true.

interview with Slowik, Fitzgerald called Ellerth to offer her the position, which Ellerth accepted. J.A. 120.

As a merchandising assistant, Ellerth assisted Fitzgerald in her day-to-day activities and travelled occasionally, usually for training-related purposes. J.A. 120. Fitzgerald reported directly to Slowik. J.A. 120. Ellerth also spoke with Slowik on the telephone approximately once a week, and can recall seeing Slowik on only eight different occasions during her fifteen months at Burlington. J.A. 120, Pet. App. 242a - 249a.

In March 1994, approximately one year after she was hired, Ellerth was promoted to the position of sales representative following interviews with Patrick Lawrence and Slowik. J.A. 121. Lawrence became Ellerth's immediate supervisor, and Lawrence reported to Slowik. J.A. 121. Ellerth knew that Slowik recommended her for the promotion. J.A. 63-64.

Approximately two months after her promotion, Ellerth's direct supervisor, Lawrence, and Donna Thibideau, Burlington's Customer Service Manager, received some complaints from customers and other Burlington employees about Ellerth. J.A. 123-125. When they (not Slowik) discussed these complaints with Ellerth, she voluntarily resigned.[2] J.A. 87-100. Ellerth left a message on Lawrence's answering machine informing him that she was quitting, effective immediately, and also faxed him a letter to the same effect, which indicated that she had accepted another job offer.

[2] In her lawsuit, Ellerth claimed that Burlington had constructively discharged her because Slowik's alleged harassment forced her to resign. As discussed below, the district court granted summary judgment for Burlington on Ellerth's constructive discharge claim. The Seventh Circuit did not disturb this holding on appeal.

Ellerth did not mention in her telephone message or her resignation letter that she believed she had been sexually harassed by Slowik. J.A. 10-14, 99.

Ellerth now alleges that Slowik asked inappropriate questions in her pre-employment interview, stared at her, told offensive jokes, complimented her physical features, touched her inappropriately twice on the knee and once on the buttocks, and used sexual innuendos in his telephone conversations with her.[3] J.A. 127-144.

Ellerth also contends that Slowik insinuated that her response to his "harassment" would affect her career at Burlington.[4] Specifically, in the summer of 1993, Ellerth accompanied Slowik to a hotel lounge while on a business trip in North Carolina. She claims that, while in the bar, Slowik told her that she ought to "loosen up," and that, upon leaving the bar, he stated, "You know, Kim, I could make your life very hard or very easy at Burlington."[5] J.A. 38-41.

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[3] The Seventh Circuit affirmed the district court's decision granting Burlington's motion for summary judgment on Ellerth's hostile work environment claim.

[4] These "threats" are the only allegations of sexual harassment before this Court that relate to the question on which this Court granted certiorari.

[5] Burlington has successfully argued below that because of the 300-day statute of limitations for Title VII claims, any claim based on this statement was time-barred. In fact, the district court specifically held that since Ellerth was clearly aware that Slowik was engaging in sexual harassment, she could not "sit back and accumulate all the discriminating acts and sue on all within the statutory period applicable to the last one," Pet. App. 260a (quoting *Moskowitz v. Trustees of Purdue University*, 5 F.3d 279, 282 (7th Cir. 1993)). Ellerth did not appeal the district court's ruling in this regard.

Ellerth also claims that, at her promotion interview in March 1994, Slowik acknowledged that he had told others that she was "arrogant" and "not loose enough" and that this gave him reservations about promoting her. She also claims that Slowik rubbed her knee, and that she pulled her leg away in response. J.A. 64-66. Nevertheless, Slowik promoted Ellerth shortly thereafter. J.A. 68-69.

Ellerth further alleges that, in May 1994, she telephoned Slowik for special permission to perform a single, minor project for a customer and that Slowik responded, "I don't have time for you right now, Kim, unless you're telling me--unless you want to tell me what you are wearing." J.A. 77-78. In a follow-up telephone call a day or two later, Slowik allegedly asked Ellerth something along the lines of, "Are you wearing shorter skirts yet, Kim, because it would make your job a whole heck of a lot easier." J.A. 79.

Ellerth did not submit or otherwise respond to Slowik's statements that she perceived as sexual advances. Nor is there any evidence that Ellerth suffered any adverse employment consequence as a result of ignoring Slowik's alleged comments. On the contrary, after Ellerth refused Slowik's alleged advances in North Carolina and at her promotion interview, she received a promotion which raised her salary by $4,000, and entitled her to receive a yearly bonus. J.A. 123.

Ellerth never informed any of her supervisors or any of Burlington's human resources personnel about Slowik's alleged

harassment until after her resignation.[6] Ellerth also stated that she chose not to inform Lawrence because "it would be his duty as my supervisor to report any incident of sexual harassment." J.A. 110-111. Ellerth was aware of Burlington's policy regarding sexual harassment. J.A. 111-112. She had received and read Burlington's employee handbook containing this policy. J.A. 111-112. Yet, she chose not to inform her supervisors because she and her husband purportedly believed that reporting Slowik's harassment would put her job in jeopardy. J.A. 114-115. This purported belief, however, was not based upon any prior conduct of anyone at Burlington, nor any experience she had at Burlington. J.A. 115.

B. Proceedings In The District Court

Burlington moved for summary judgment on the grounds that, under the undisputed facts of the case, a reasonable jury could not find it liable for hostile work environment sexual harassment or constructive discharge, the only two claims articulated in Ellerth's complaint. The district court agreed. The district court granted summary judgment for Burlington on Ellerth's constructive discharge claim, reasoning that "when an employer provides an avenue for relief from sexual harassment and an employee chooses to forego that avenue, she cannot be heard to complain that she was constructively discharged by virtue of the harassment." Pet.

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[6] Ellerth does claim that she informed certain non-supervisory co-workers about Slowik's alleged harassment, but each of these individuals denied that Ellerth ever complained of sexual harassment by Slowik. Nevertheless, Burlington assumed, for purposes of summary judgment, that Ellerth informed these individuals of the alleged harassment. Ellerth concedes, however, that she did not properly report the sexual harassment in that she did not inform her supervisors, anyone in human resources, or anyone else in authority at Burlington, about the alleged harassment. J.A. 104-113.

App. 286a - 287a. The district court also granted summary judgment on Ellerth's hostile work environment claim, holding that because Burlington lacked knowledge of Slowik's alleged harassment, it was not negligent in failing to prevent it. Pet. App. 285a. The district court did not believe that Ellerth had intended to advance a *quid pro quo* claim, but held that, in any event, "for Ellerth to prevail on a theory of *quid pro quo* harassment, she would have to prove that Slowik actually withheld tangible employment benefits as a result of her failure to submit to his sexual overtures." Pet. App. 264a. Because Ellerth had presented no such evidence, the district court disregarded *quid pro quo* as a basis for recovery.

C. The Decision Of The Court Of Appeals Panel

Ellerth appealed the district court's ruling to the Seventh Circuit. A three-judge panel of the court of appeals reversed the district court and held that Ellerth had presented sufficient evidence to proceed to the jury under either a *quid pro quo* or a hostile work environment theory. With respect to the former theory, the panel found that Slowik's comments constituted *quid pro quo* propositions which were themselves actionable, notwithstanding the fact that they did not induce Ellerth to submit to Slowik's alleged sexual advances and Slowik never followed through on his alleged implicit threats of retribution. Pet. App. 220a-221a. The panel also held that Burlington could be liable for Slowik's hostile work environment sexual harassment, despite the fact that Ellerth knew Burlington had a policy against sexual harassment and chose not to complain about the harassment until after she resigned. Burlington successfully petitioned the Seventh Circuit for rehearing en banc and the panel opinion was vacated.

D. The Decision Of The En Banc Court Of Appeals

In a per curiam decision preceding eight separate signed opinions, the Seventh Circuit, en banc, held that employers may be held strictly liable under Title VII of the Civil Rights Act of 1964 on a *quid pro quo* sexual harassment theory even if the allegedly harassed employee neither submitted to a supervisor's sexual advances nor suffered any adverse employment consequences as a result of refusing these advances.[7]

A bare majority of the judges (six of eleven) concurred in the panel's view "that liability for *quid pro quo* harassment is strict even if the supervisor's threat does not result in a company act," *i.e.*, does not result in some adverse employment consequence. Pet. App. 7a. Based on this principle, the court held Slowik's alleged *quid pro quo* propositions[8] to be a sufficient basis for Ellerth to defeat summary judgment on her *quid pro quo* claim.

Writing for a plurality of four judges, Judge Flaum held that "a clear and serious *quid pro quo* threat alters the `terms and conditions' of employment in such a way as to violate Title VII and therefore can constitute an actionable claim even if the threat remains unfulfilled." Pet. App. 17a. Judge Flaum opined that this conclusion was consistent with principles of

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[7] The Seventh Circuit also held that in a hostile work environment sexual harassment case, the applicable standard for judging a company's liability for a supervisor's harassing acts is negligence, not strict liability. On appeal, a clear majority of judges also found that Ellerth had waived her hostile work environment argument. Pet. App. 6a.

[8] Specifically, the panel based this finding on Slowik's alleged comment over the telephone that he did not have time for Ellerth "unless [she] want[ed] to tell [him] what [she was] wearing." Pet. App. 221a.

agency law which hold a principal liable for its agent's exercise of delegated authority and with the intent of the 1991 amendments to the Civil Rights Act which provide compensation for emotional damage. Pet. App. 17a-18a.

Five of the eleven judges, namely Chief Judge Posner, Judges Kanne, Manion, Easterbrook and Coffey, each submitted separate concurring and dissenting opinions in which they rejected Judge Flaum's view that a supervisor's unfulfilled threats amounted to *quid pro quo* sexual harassment.[9]

Chief Judge Posner reasoned that the strict liability standard should apply only to "company acts," which he defined as "an act that significantly alters the terms or conditions of employment of the victim of sexual harassment." Pet. App. 54a. It is only these acts, Chief Judge Posner stated, which are within an employer's reasonable ability to monitor and control. Pet. App. 51a. It would be inappropriate to apply standards of strict liability to "non-company acts" such as unfulfilled threats of job retaliation because this conduct is "outside the channels in which action by supervisors is realistically controllable by their superiors." Pet. App. 53a. Chief Judge Posner noted that other circuits have adopted this approach to sexual harassment claims. Pet. App. 52a.

In his opinion, Judge Coffey wrote that *quid pro quo* harassment, by its very definition, requires "something for something," that is, an exchange linking an economic benefit to participation in sexual conduct. Pet. App. 95a. Thus, a plaintiff claiming *quid pro quo* sexual harassment must allege

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[9] While Judge Easterbrook wrote that Ellerth's claim should only be analyzed as a hostile work environment claim, he joined in Judge Wood's conclusion that Burlington should be strictly liable for Slowik's hostile work environment harassment.

that she suffered a materially adverse employment action due to the harassment. Pet. App. 95a. Judge Coffey also noted that none of the cases relied upon by Judge Flaum in advancing his "attempted quid pro quo harassment" doctrine involved merely unfulfilled threats of retaliation. Rather, in each of those cases, the employee either submitted to the supervisor's advances or suffered tangible consequences for refusing to do so. Pet. App. 100a-101a.

Judge Kanne also wrote that an employer should not be strictly liable for mere threats made by a supervisory employee. Agreeing that the focus should be on deterrence, Judge Kanne stated that a negligence standard would suffice because "employers will rationally seek to avoid liability 1) by establishing policies and procedures to circumscribe improper conduct by supervisors, and 2) by imposing appropriate sanctions against errant supervisors once notified by an employee that a supervisor has made a quid pro quo threat." Judge Kanne also cautioned that because *quid pro quo* threats can be ambiguous, if such threats make an employer strictly liable, "plaintiffs will attempt to turn all instances of supervisor sexual harassment into 'implied threats' in order to take advantage of strict liability's easier burden of proof." Pet. App. 33a.

Judge Easterbrook also believed that Ellerth's claims should be analyzed only under a hostile work environment theory, reasoning that, since Slowik's implications that he would hinder Ellerth's advancement if she did not provide sexual favors were never carried through, and Ellerth never submitted to his unlawful demands, Slowik's attempts failed, leaving only the unpleasant working environment. Pet. App. 151a-152a.

Judge Manion, agreeing that "a threat without negative job consequences cannot support a quid pro quo claim," reasoned that "absent a complaint by the employee, the company is in the dark" and the imposition of strict liability is clearly unjust. Pet. App. 160a. Judge Manion further explained that threats cannot constitute *quid pro quo* harassment for the same reason they could not fall within the supervisor's scope of employment -- they are not authorized, they do not carry the employer's imprimatur and they do not speak on behalf of the company. Pet. App. 161a.

SUMMARY OF ARGUMENT

Expanding the scope of employer strict liability to situations where, as here, a supervisor makes an empty threat that does not result in any job detriment or submission by the employee would be an unwarranted expansion of Title VII liability. According to the Seventh Circuit's ruling, Burlington's liability attached the second Slowik uttered an implied threat, regardless of Burlington's lack of knowledge of the conduct, or the steps Burlington successfully took to notify Ellerth that such conduct would not be tolerated, and regardless of how the implied threat was perceived by Ellerth.

Congress simply cannot have intended for Title VII to make employers strictly liable for the behavior of their supervisory employees at all times and all places. Congress likewise cannot have intended for employers to be strictly liable for actions of which they have no notice and no reasonable means of acquiring notice, and which cannot reasonably be imputed to them under agency principles.

Thus, there must be some limits to the definition of *quid pro quo* sexual harassment and limits on what conduct is entitled to be held to a strict liability standard. This standard

should not apply to the "threatened *quid pro quo*" which the Seventh Circuit recognized in the instant case.

Instead, an employee alleging a *quid pro quo* sexual harassment claim for which a company may be strictly liable must establish that she has suffered a tangible job detriment as a result of her refusal to submit to sexual demands. If, as the facts in the instant case demonstrate, the employee rebuffs her supervisor's advances, and suffers no tangible job detriment, the company should not be strictly liable for the supervisor's empty threat. Rather than imposing the harsh strict liability standard the Seventh Circuit has mandated, the district court properly analyzed Slowik's alleged "threats" under a hostile work environment theory and considered the undisputed facts that Ellerth was aware of Burlington's sexual harassment policy and complaint procedure, knew that Slowik's "threats" violated Burlington's sexual harassment policy, and still consciously chose not to complain about the threats until after she resigned from her employment at Burlington.

A strict liability standard is inappropriate in addressing unfulfilled threats since there has been no action on the part of the employer (*i.e.*, there has been no termination, demotion, etc.) and employers have no effective means of monitoring the "non-company acts" of their supervisors. Broadening the scope of *quid pro quo* harassment to include mere threats would also place more sexual harassment claims under the umbrella of strict liability, as opposed to the negligence standard generally applicable to hostile work environment sexual harassment claims.

Application of a strict liability standard to the threats made by Slowik is also contrary to this Court's admonition in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986), that companies are not to be held absolutely liable for all forms of

sexual harassment and that courts should be guided by the common-law principles of agency. Under those principles, Burlington cannot be held liable for Slowik's alleged threats since it is clear that he was not acting within the scope of his employment when he made the threats (*i.e*, sexual harassment is not within the scope of employment), and since it is clear that Ellerth knew he did not have "authority" to engage in such conduct, based on her admitted knowledge of Burlington's sexual harassment policy.

The D.C. Circuit, the only other Circuit to directly address the issue of threat only *quid pro quo* harassment, has properly held that threats alone do not amount to *quid pro quo* harassment in the absence of tangible effects on employment. *Gary v. Long*, 59 F.3d 1391 (D.C. Cir. 1995), *cert. denied*, 116 S.Ct. 569 (1995). The court declared, "it takes more than saber-rattling alone to impose *quid pro quo* liability on an employer; the supervisor must have wielded the authority entrusted to him to subject the victim to adverse job consequences as a result of her refusal to submit to unwelcome sexual advances." 59 F.3d at 1396. Most circuit courts have agreed with this analysis. *See infra* pp. 31-35.

The approach adopted by the D.C. Circuit, and a majority of the circuits, to *quid pro quo* sexual harassment is more sound and better balances the interests of employees and employers than does the Seventh Circuit's approach. This is demonstrated by the facts of the instant case. Title VII's goals would be best served if Ellerth were required to complain about the alleged threats, thus providing Burlington with an opportunity to investigate and remedy any improper conduct. Under a strict liability standard where Ellerth has no incentive to report the conduct, Burlington could only have known about the alleged threats if it had monitored Slowik's every move.

ARGUMENT

Strict liability under Title VII should be reserved to remedy only a narrow set of egregious circumstances where an employee actually suffers a tangible job detriment as a result of her refusal to submit to a supervisor's unlawful sexual advances. In the absence of a tangible job detriment, any implied threats, or ambiguous statements perceived as such, are concealed from the employer. In the instant case, Ellerth suffered no tangible job detriment as a result of her refusal to submit to Slowik's purported threats, and Burlington had no way of learning of the implied threats except through Ellerth who chose not to complain about them. Burlington should, therefore, be held to a negligence, not strict liability, standard in evaluating Slowik's conduct.

I. THE HARSH STRICT LIABILITY STANDARD SHOULD NOT BE APPLIED TO A SUPERVISOR'S UNFULFILLED THREATS; SUCH THREATS WERE PROPERLY ANALYZED UNDER A HOSTILE WORK ENVIRONMENT THEORY

Courts began to recognize sexual harassment claims during the late 1970's after gender-based discrimination was included in Title VII of the Civil Rights Act of 1964. Soon thereafter, courts developed the now well-known and generally accepted distinction between *quid pro quo* and hostile work environment harassment.[10] Classification of a sexual

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[10] In 1982, the Eleventh Circuit, in *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982), outlined the prima facie elements of a *quid pro quo* claim under Title VII and lower courts have, for the most part, consistently followed that court's guidance. In *Henson*, the court stated that, in order to establish a *quid pro quo* claim, an employee must (continued...)

harassment claim as either *quid pro quo* or hostile work environment determines the standard of employer liability, *i.e.*, companies are strictly liable for *quid pro quo* claims where they have caused a tangible detriment to the employee but liable only under a negligence standard for hostile work environment harassment.

Although sexual harassment has consistently been analyzed by courts in terms of either *quid pro quo* or hostile work environment harassment, this Court has never explicitly approved this distinction. Neither *Meritor*, 477 U.S. 57, nor *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993), the only two

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[10](...continued)
demonstrate that:

> (1) The employee belongs to a protected group.
> (2)The employee was subject to unwelcome sexual harassment.
> (3) The harassment complained of was based upon sex.
> (4) The employee's reaction to harassment complained of affected tangible aspects of the employee's compensation, terms, conditions, or privileges of employment. The acceptance or rejection of the harassment by an employee must be an express or implied condition to the receipt of a job benefit or the cause of a tangible job detriment in order to create liability under this theory of sexual harassment. **As in the typical disparate treatment case, the employee must prove that she was deprived of a job benefit which she was otherwise qualified to receive because of the employer's use of a prohibited criterion in making the employment decision.**
> (5) Respondeat superior.

Id. at 909 (emphasis added).

sexual harassment cases previously decided by this Court, involved a *quid pro quo* claim.[11]

A. The *Quid Pro Quo* Theory Of Sexual Harassment And Its Strict Liability Standard Has Been And Should Be Narrowly Construed To Compensate Employees Who Actually Suffer Tangible Job Detriments As A Result Of Their Refusal To Submit To A Supervisor's Sexual Demands

Quid pro quo harassment occurs in a narrow and specific set of circumstances where a supervisor demands sexual favors from an employee and the employee either submits to the demand or suffers a tangible job detriment for failing to submit.[12] In a non-submission case, the discrimination occurs when the supervisor makes an employment decision that adversely affects the employee based

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[11] Although *Meritor* was not a *quid pro quo* harassment case, this Court contrasted hostile work environment sexual harassment with *quid pro quo* harassment by stating that a hostile work environment may be proven whether or not the harassment is "directly linked to the grant or denial of an economic quid pro quo." *Id.* at 65 (emphasis added). The word "economic" before *quid pro quo* clearly implies that the Court recognized that an economic job detriment or benefit typically exists in a *quid pro quo* case, and that such an element distinguishes it from a hostile work environment claim.

[12] A tangible job detriment, however, is not required in suits alleging hostile work environment sexual harassment. In such cases, the harassment victim typically is subjected to unwelcome sex-related behavior that has the purpose or effect of unreasonably interfering with her work performance or of creating an intimidating, hostile, or offensive working environment. For such conduct to be actionable, it must be sufficiently severe and pervasive to alter the conditions of the victim's employment and create an abusive working environment.

on an illegal reason, *i.e.*, the failure of the employee to submit to his sexual demands.[13] Without an act by the supervisor, there has been no *quid pro quo* harassment. As a result, there should be no strict liability.

In the classic *quid pro quo* case, a supervisor threatens to terminate an employee if she refuses to engage in sexual relations with him. When the employee refuses and is terminated, she can assert a *quid pro quo* claim against her employer, who, if the employee is successful in proving her claim, will be strictly liable for the supervisor's actions. The strict liability standard and resulting remedy are aimed at addressing the discrimination the employee has suffered. The utterance of words, which are only "threats" to discriminate, is not enough for such a claim.[14]

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[13] While courts have utilized the concept of *quid pro quo* harassment largely to rectify the economic loss suffered by victims of such harassment and this Court in *Meritor* characterized *quid pro quo* as "economic quid pro quo," (*see* n. 11 *infra*), it is well-settled that a tangible job detriment need not be economic in nature as long as it is tangible and material. *See, e.g., Bryson v. Chicago State Univ.*, 96 F.3d 912 (7th Cir. 1996)(the loss of a job title and banishment from committee work were considered tangible job detriments).

[14] This rationale is consistent with other aspects of Title VII law where, for example, a company is liable when a supervisor fires a black employee because of his race. Such an act is a company act and the company is liable for the tangible job detriment suffered by the employee who is fired because of his race. If an employee suffers no tangible job detriment, as in the case of a threat only, an employer is not liable under Title VII because there has been no act by the company. In the instant example, if a supervisor merely threatens to fire a black employee because of his race, but does not do so, the company is not automatically liable because the employee has suffered no tangible job detriment.

As Professor J. Hoult Verkerke of the University of Virginia School of Law explained, a *quid pro quo* claim:

> requires that the victim either actually refuse the advances and suffer a tangible job detriment or submit and retain a tangible job benefit. Quid pro quo theory appears not to encompass cases in which the supervisor threatens a job detriment but fails to carry through on his threat after the victim refuses to submit. **There is no doctrine of attempted quid pro quo; such unwelcome sexual advances could only be challenged under the hostile work environment theory.**

J. Hoult Verkerke, *Notice Liability In Employment Discrimination Law*, 81 Va. L. Rev. 273, 280 n. 15 (1995)(emphasis added). *See also*, Rachel E. Lutner, *Employer Liability For Sexual Harassment: The Morass Of Agency Principles And Respondeat Superior*, 3 Univ. Ill. L. Rev. 589, 611 (1993)("[t]he quid pro quo claim is limited by its definition of 'tangible job detriment'"); Stacey Dansky, *Eliminating Strict Employer Liability In Quid Pro Quo Sexual Harassment*, 76 Tex. L. Rev. 435, 439 (1997)("[q]uid pro quo sexual harassment technically differs from hostile environment sexual harassment in that in the quid pro quo context, the supervisor directly manipulates the actual terms or conditions of employment, in the hostile environment context, the supervisor constructively alters the employment conditions by engaging in sufficiently severe and pervasive harassing conduct"); and Michael J. Phillips, *Employer Sexual Harassment Liability Under Agency Principles: A Second Look At Meritor Savings Bank, FSB v. Vinson*, 44 Vand. L. Rev. 1229 (1991)("courts generally agree that the employee must have suffered some tangible job detriment to pursue a quid pro quo claim.")

B. Slowik's Implied Threats Were Properly Analyzed By The District Court Under A Purely Hostile Work Environment Theory Where The Court Evaluated The Threats In The Context Of All Relevant Circumstances

Slowik's statements were properly analyzed by the district court under a hostile work environment theory where the proper standard of liability is negligence and the court could account for all the circumstances of the case.[15] Imposing a higher standard of strict liability would preclude such an analysis and thwart the purposes of Title VII. The facts of this case are a perfect illustration of how Title VII could be abused by employees if employers were held absolutely liable for threats only, without even any inquiry into the severity of the threats, or the reasonableness of the employee's belief that the threats could be carried out.

Ellerth claims that, at her promotion interview, she was threatened with Slowik's vague statement that he had hesitations about promoting her because she was "arrogant" and not "loose enough." Despite this alleged threat and Ellerth's failure to submit to what she perceived to be Slowik's advances, Ellerth was in fact promoted shortly after the interview, and Ellerth has acknowledged that she knew that Slowik recommended her promotion.

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[15] In *Meritor*, this Court held that "[f]or sexual harassment to be actionable, it must be sufficiently severe or pervasive to alter the conditions of [the victim's] employment and create an abusive working environment." *Id.* at 67. Under a hostile work environment negligence standard, an employer's culpability for supervisory sexual harassment can be assessed in the context of all relevant circumstances.

The district court's analysis in this case also considered the fact that Ellerth knew that Slowik's statements were improper and against company policy and that Slowik was clearly not acting with the company's imprimatur when he made the threats. Burlington had in place a policy prohibiting sexual harassment which effectively divested Slowik of any authority to conduct the harassment or issue the threats. This policy, which described avenues of recourse for those who believed they had been harassed, was known by Ellerth. Under a hostile work environment theory, this evidence is relevant to establish whether Burlington is liable and, in fact, was determinative in deciding that Burlington was not liable for hostile work environment harassment in this case.

Since Ellerth knew that Slowik's statements were in direct contravention of Burlington's sexual harassment policy, and since Ellerth was promoted even though she did not submit to Slowik's alleged sexual advances, Ellerth could not have reasonably believed that Slowik's two future "threats", (*i.e.*, Slowik's request that Ellerth tell him what she was wearing, and his statement to her that if she were wearing shorter skirts it would make her job easier) would result in a tangible job detriment if she did not engage in the requested conduct.

If Burlington were held to a strict liability standard in this case, Ellerth would be entitled to recover for Slowik's implied threats, despite 1) Ellerth's knowledge that such threats were strictly prohibited by Burlington's sexual harassment policy, 2) Ellerth's knowledge that such threats could not be legally carried out by Slowik, 3) Ellerth's knowledge of Burlington's complaint procedure and failure to utilize it, 4) Ellerth's admission that, had she complained about the threats to her immediate supervisor, it would have been his duty to report the conduct, and 5) Ellerth's understanding that Slowik had previously impliedly threatened her promotion and failed

to follow through on what she perceived to be a threat. Such an outcome in this case would be unjust and would not promote the remediation and deterrence policies promoted by Title VII. Rather, it would send a message to employers that, regardless of the vigilant measures they may take to inform employees of their preventative policies prohibiting sexual harassment and their grievance procedures, they may still be held strictly liable under the circumstances presented in this case.

II. A STRICT LIABILITY STANDARD SHOULD NOT APPLY TO A SUPERVISOR'S IMPLIED THREATS SINCE AN EMPLOYER HAS NO KNOWLEDGE OF SUCH CONDUCT AND NO WAY OF COMPLETELY ELIMINATING SUCH CONDUCT

A. A Strict Liability Standard Should Not Apply In Threat Only Cases Since There Is No Company Act And An Employer Will Not Have Knowledge Of Any Potential Wrongdoing

The rationale for applying a strict liability standard to *quid pro quo* harassment is that, under agency principles, when a supervisor implements an employment benefit or detriment based upon an employee's receptiveness to sexual advances, the supervisor is using the authority delegated by the employer and therefore acts as the employer. Pet. App. 12a; *see also Kotcher v. Rosa and Sullivan Appliance Ctr., Inc.*, 957 F.2d 59, 62 (2d Cir. 1992); *Steele v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311, 1316 (11th Cir. 1989). In such circumstances, the employer knows or should know of the decision because, to borrow Chief Judge Posner's terminology, the supervisor has engaged in a "company act." Pet. App. 51a. In other words, there has been a job decision in which the supervisor is

actually exercising delegated authority. An employer would have the opportunity to weed out *quid pro quo* harassment through aggressive scrutiny of promotions, demotions, performance reviews and the like for retaliatory or other impermissible motives.

The same is not true when a supervisor suggests that job benefits are limited to an employee's response to his sexual advances, but then fails to act upon these suggestions. Here, the supervisor has not actually used any authority delegated by the employer; at most, he has only contemplated doing so. Because employers cannot monitor every interaction between supervisors and their subordinates, they cannot be aware of such a "threat" because no actual job action has occurred which would trigger review by the employer. Imposing strict liability in such circumstances would create a draconian burden on employers who are already taking extensive measures to combat harassment.

A situation involving unfulfilled threats is most analogous to that of sexual harassment which creates a hostile work environment in that the employer has not granted or withheld an employment benefit based on sex and will not be aware of the harassment. It is because courts recognize that employers cannot possibly be responsible for every unofficial action taken by their employees in the workplace, that a negligence standard applies to hostile work environment claims. Pet. App. 22a-23a. For this same reason, an unfulfilled threat should be regarded as evidence of a hostile work environment and held to a negligence standard, rather

than as independently actionable conduct for which the employer may be held strictly liable.[16]

None of these justifications for a strict liability standard exist where a *quid pro quo* harassment claim is based on an unfulfilled retaliatory threat or other "non-company" act. In these circumstances, the employer will have no notice or any record of the action which gives rise to the employee's claim because no tangible effect on the employee's employment status is necessary to make out such a claim. Furthermore, the employer will not have, through its supervisory employee, acted in any official capacity toward the employee. Avoiding liability under a strict liability standard will literally require employers to monitor every interaction between supervisory and other employees. Imposing such burdens on employers would be contrary to public policy because employers would be discouraged from implementing reasonable policies to combat sexual harassment if those policies did not afford them protection from liability.

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[16] Professor Verkerke recognized this notice distinction between *quid pro quo* harassment and, as he calls it, attempted *quid pro quo* harassment, when he wrote "[q]uid pro quo harassment thus involves unconcealed action -- an adverse employment decision -- about which the employer can learn even more easily than victims." Verkerke, 81 Va. L. Rev. at 367. On the other hand, attempted *quid pro quo* harassment does not involve an unconcealed action. Addressing such circumstances, Professor Verkerke wrote, "[i]f a supervisor fails to follow through on his threat of sexual blackmail ... the unwelcome sexual advance could presumably be the basis for a hostile environment claim." *Id.*, at n. 261.

B. Imposing A Strict Liability Standard For Threats Would Place An Impossible Burden On Employers While At The Same Time Encroaching On Employee Privacy

Generally, strict liability is applied when a person stands in a unique position to prevent a foreseeable harm to another. *See Restatement (2d) of Torts*, §§ 519 & 520; *Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d 57, 63, 377 P.2d 897, 901 (1963)(discussing application of strict liability to product liability cases). However, as a practical matter, an employer is without the ability to prevent workplace *quid pro quo* sexual harassment in its entirety. Attempting to eradicate this problem would require invasive monitoring of the behavior of hundreds or even thousands of supervisory employees performing different functions in different locales, each of whom must be given some level of discretion to perform their jobs.[17] In this context, strict liability places an impossible burden on employers while at the same time encroaching on employee privacy.

This is not to say that employers are powerless to deter or reduce sexual harassment in the workplace or that an employer's inattention to or casual treatment of sexual harassment should not form the basis for liability. However, the adequacy of an employer's efforts in this regard should be judged by a standard of reasonableness, not by whether the employer has been successful in completely stamping out a deeply rooted societal malady. Under a negligence standard, an employer's culpability for threats can be assessed in the context of all relevant circumstances, including the severity of the threat, how the threat was perceived by the victim of it, and

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[17] In some states, such monitoring of employees would expose employers to liability for invasion of privacy.

whether the employer had made it clear to employees that any such threats would not be tolerated and would be redressed by the employer. By contrast, the strict liability standard which the Seventh Circuit has applied to threats focuses only on whether a threat was made, not on what the employer has already done to combat harassment, what the employer could have done to prevent the particular instance of harassment, or how the employer attempted to remedy the harassment if it was brought to the employer's attention.

C. If Threats Only Are Actionable Under A Strict Liability Standard, The Number Of *Quid Pro Quo* Claims Will Increase Significantly

The Seventh Circuit's categorization of unfulfilled retaliatory threats as *quid pro quo* sexual harassment is also likely to greatly expand the number of sexual harassment claims brought under a *quid pro quo* theory and decrease the number of cases which may be resolved at the summary judgment stage. Whereas under the approach adopted by a majority of the circuits, a plaintiff must produce evidence of a tangible Job detriment in order to proceed on a *quid pro quo* claim, if mere threats are indeed actionable as *quid pro quo* harassment, a plaintiff need only allege that a supervisor's offensive conduct was linked to a job detriment or benefit.

Thus, many claims which were previously adjudicated under the negligence standard associated with a hostile work environment theory will be transformed into strict liability *quid pro quo* cases. As cautioned by Judge Manion, "because so many complaints of sexual harassment contain threatening comments, *quid pro quo* harassment and strict liability would become the typical case rather than the narrow exception it should be." Pet. App. 161a. Because these cases will often

depend upon resolution of the conflicting testimony of the plaintiff and the accused supervisor, they will be incapable of resolution at the summary judgment stage. The resulting increase in jury trials will further burden the already overtaxed federal judiciary and increase employers' Title VII-related litigation costs.

III. THE SEVENTH CIRCUIT'S EXPANSION OF THE *QUID PRO QUO* DOCTRINE TO INCLUDE SLOWIK'S IMPLIED THREATS IS CONTRARY TO THIS COURT'S STRICT LIABILITY DISCUSSION CONTAINED IN *MERITOR* AND THE APPLICATION OF COMMON-LAW AGENCY PRINCIPLES

This Court held in *Meritor* that employers are not automatically or strictly liable for sexual harassment by their supervisors. *Meritor*, 477 U.S. at 72. Rather, this Court stated that Congress intended for courts to be guided by agency principles in determining the proper standard of liability. *Id.*[18] Although announcing this holding in *Meritor*, the Court also cautioned that "such common-law principles may not be transferable in all their particulars to Title VII . . . . " *Id.*

Application of a strict liability standard to mere threats of retaliation has no support in the traditional agency principles set forth in the *Restatement (Second) of Agency*, which courts have routinely used as a guide to establishing liability. Rather, under agency principles, an employer may only be held liable

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[18] This Court held that Congress' decision to define an "employer" for purposes of Title VII to include an "agent" of an employer "surely evinces an intent to place limits on the acts of employees for which employers under Title VII are to be held liable." *Id.*

for its own conduct that results in harm to an employee through the acts of a supervisor. In other words, an employer that authorizes or ratifies unlawful threats made by a supervisor, or that is negligent in addressing them once they are brought to the employer's attention, could be liable.

In this case, it is undisputed that Burlington neither authorized nor ratified Slowik's threats, nor was it negligent in addressing them since they were never even brought to Burlington's attention. Under common-law agency principles, therefore, Burlington cannot be liable for Slowik's threats.

A. Slowik's Implied Threats Were Outside The Scope Of His Employment

When Slowik allegedly requested, over the telephone, that Ellerth tell him what she was wearing and when he asked her if she was wearing shorter skirts yet, he was pursuing his own agenda and clearly acting outside the scope of his employment and Ellerth knew it. Under well-established agency principles, Burlington cannot be held strictly liable for that conduct.

Section 219(1) provides that an employer is liable for the torts of an employee committed while acting "within the scope of employment." *Restatement (2d) of Agency*, § 219(1). Section 228(1) in turn provides that conduct is within the scope of an employee's employment if and only if:

> (a) it is the kind he is employed to perform;
>
> (b) it occurs substantially within the authorized time and space limits;
>
> (c) it is actuated, at least in part, by a purpose to serve the master, and;

(d) if the force is intentionally used by the servant against another, the use of force is not unexpectable by the master.

Restatement (2d) of Agency, § 228(1).

Applying these criteria to threats in this case, it is clear that two of the three relevant and necessary factors do not even apply, *i.e.*, (a) supervisors are not employed to make threats of retaliation for failing to submit to sexual advances; and (c) a supervisor's threats are not actuated, even in part, by a purpose to serve his employer. As Judge Posner once remarked, "[i]t would be the rare case where . . . harassment . . . could be thought by the author of the harassment to help the employer's business." *Hunter v. Allis-Chalmers Corp., Engine Div.*, 797 F.2d 1417, 1422 (7th Cir. 1986). In fact, to the contrary, sexual harassment generally interferes with an employer's business.[19]

---

[19] Although employers have generally been held liable under Section 219(1) of the *Restatement* for *quid pro quo* sexual harassment, that liability is based on the principle that "[t]he supervisor is deemed to act on behalf of the employer when making decisions that affect the economic status of the employee." *Kotcher*, 957 F.2d at 62 (emphasis added); *see also Steele*, 867 F.2d at 1316 (holding that employer liability is appropriate in *quid pro quo* cases because the supervisor "acts within the scope of his actual or apparent authority to `hire, fire, discipline or promote'") (citing *Henson*, 682 F.2d at 910). This reasoning is inapplicable to the instant case because Slowik never exercised whatever power he may have had to affect tangible aspects of Ellerth's employment and therefore never wielded such authority.

B. Ellerth Could Not Have Reasonably Believed That Slowik Had The Apparent Authority To Make The Implied Threats She Has Alleged

The apparent authority principles contained in Section 219(2)(d) of the *Restatement* cannot be used as a basis for strict liability in this case since Ellerth could not reasonably have believed that Burlington authorized Slowik to make the threats alleged in this case. In fact, Ellerth's admissions that she was aware of Burlington's sexual harassment policy and grievance procedure, coupled with her acknowledgment that had she complained about Slowik's threats to her immediate supervisor it would have been his duty to report the conduct to Burlington's attention, belie any such claim.

Section 219(2)(d) of the *Restatement* provides that an employer may be liable for the acts of an employee occurring outside of the scope of employment where "the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or was aided in accomplishing the tort by the existence of the agency relation." *Restatement (2d) of Agency*, § 219(2)(d). "As the commentary to the Restatement suggests . . . this exception embraces a narrower concept that holds the employer liable only if the tort was 'accomplished by an instrumentality, or through conduct associated with the agency status.'" *Gary*, 59 F.3d at 1397 (quoting Restatement § 219 cmt. e). The commentary illustrates liability under the second clause of § 219(2)(d) with two narrow examples; a telegraph operator sending false telegraph messages, or a store manager cheating customers at the store. As the D.C. Circuit recognized, "[i]n such cases, '[l]iability is based upon the fact that the agent's position facilitates the consummation of the [tort], in that from the point of view of the third person the transaction seems regular on its face and the agent appears to be acting in the ordinary course

of the business confided to him.'" *Gary*, 59 F.3d at 1397 (quoting Restatement § 261 cmt. a, *see also* Restatement § 219 cmt. e (citing § 261 cmt. a)).

Thus, Burlington cannot be liable for Slowik's alleged threats under section 219(2)(d) because, to Ellerth, Slowik's conduct could hardly "seem regular on its face." Ellerth was fully aware, based on her admitted knowledge of Burlington's sexual harassment policy, that Slowik did not have the "authority" (whether apparent or delegated) to sexually harass her, and, in fact, knew that Burlington had alternative procedures in place to redress any harassment. *See also Smith v. Metropolitan School Dist. Perry Township.*, 128 F.3d 1014 (7th Cir. 1997) (§ 219 (2)(d) cannot be used as basis for holding school district liable for sexual harassment where it was clear harasser's conduct "could hardly seem regular on its face"); *Andrade v. Mayfair Management, Inc.*, 88 F.3d 258, 262 (4th Cir. 1996) (employer not liable for supervisor's sexual harassment where plaintiff knew that she could complain to another corporate officer and therefore could not have reasonably believed that supervisor was acting on behalf of employer); *Bouton v. BMW of North America, Inc.*, 29 F.3d 103, 109 (3d Cir. 1994) ("Our agency precedent requires the belief in the agent's apparent authority to be reasonable before the principal will be bound").[20]

---

[20] Moreover, as the court in *Gary* recognized, "[it] is a general principle of agency law that:

> [i]f a person has information which would lead a reasonable man to believe that the agent is violating the orders of the principal or that the principal would not wish the agent to act under the circumstances known to the agent, he cannot subject the principal to liability."

(continued...)

IV. THE MAJORITY OF CIRCUIT COURTS AGREE THAT THE DOCTRINE OF *QUID PRO QUO* SEXUAL HARASSMENT DOES NOT APPLY TO UNFULFILLED THREATS

No Circuit, other than the Seventh Circuit in this case, has held an employer strictly liable for unfulfilled threats. Rather, a majority of circuits require a plaintiff to prove, as an element of a Title VII *quid pro quo* sexual harassment claim, that the harassment affected tangible aspects of the employee's compensation, terms, conditions or privileges of employment.

A. The District Of Columbia Circuit Court, The Only Other Circuit Court To Directly Address This Issue, Has Held That A Tangible Job Detriment Is Required In *Quid Pro Quo* Cases

The only Circuit other than the Seventh Circuit to directly address the scope of *quid pro quo* claims is the Court of Appeals for the District of Columbia. In *Gary v. Long*, 59 F.3d 1391 (D.C. Cir. 1995), *cert. denied*, 116 S.Ct. 569 (1995), the District of Columbia Circuit rejected an employee's *quid pro quo* sexual harassment claim where the employee had produced no evidence that her supervisor's sexual advances had any tangible effects on her employment. There, in a much more aggravated factual situation than presented here, the plaintiff's supervisor first promised that he would "make her job easier" if she would have sex with him and then threatened

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[20](...continued)
Gary, 59 F.3d at 1398, citing Restatement § 166 cmt. a. Based on this principle, Ellerth could not have believed (nor has she ever claimed she believed) that Slowik was acting within his authority when he allegedly made the threats at issue in this case.

various reprisals, including termination, if she refused to have sex with him. *Id.* at 1393-94.

The D.C. Circuit nonetheless held that the plaintiff could not state a *quid pro quo* claim against her employer because she had adduced no evidence that the supervisor's threats were ever carried out. *Id.* at 1396. The court declared, "it takes more than saber-rattling alone to impose *quid pro quo* liability on an employer; the supervisor must have wielded the authority entrusted to him to subject the victim to adverse job consequences as a result of her refusal to submit to unwelcome sexual advances." *Id.* at 1396. The absence of such consequences in that case precluded the plaintiff from proceeding under a *quid pro quo* theory. The same absence of such consequences in this case precludes Ellerth from proceeding under a *quid pro quo* theory.

B. The First, Second, Fourth, Fifth, Sixth, Eighth And Tenth Circuits Have All Defined *Quid Pro Quo* Harassment As Requiring A Tangible Job Detriment Or Submission

The First, Fourth, Fifth, Sixth, Eighth, Tenth and Eleventh Circuits have all defined *quid pro quo* harassment consistently with the holding in *Gary*. Each of these circuits has stated that an essential element of a *quid pro quo* claim is that the harassment affect tangible aspects of the plaintiff's employment. *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 898 (1st Cir. 1988) (an essential element of *quid pro quo* harassment is that the employee "was subject to unwelcome sexual advances by a supervisor or teacher and . . . that his or her reaction to these advances affected tangible aspects of his or her compensation, terms, conditions or privileges of employment . . . ."); *accord Chamberlin v. 101 Realty, Inc.*, 915 F.2d 777, 783 (1st Cir. 1990)(quoting *Lipsett*); *Spencer v.*

General Electric Co., 894 F.2d 651, 658 (4th Cir. 1990)(essential element of a *quid pro quo* sexual harassment claim is that "[t]he employee's reaction to the harassment affected tangible aspects of the employee's compensation, terms, conditions or privileges of employment"); *Ellert v. University of Texas, at Dallas*, 52 F.3d 543, 545 (5th Cir. 1995)(*quid pro quo* harassment claim requires proof that the employee's "reaction to the harassment affected tangible aspects of the terms and conditions of her employment"); *Kauffman v. Allied Signal, Inc.*, 970 F.2d 178, 187 (6th Cir.), *cert. denied*, 506 U.S. 1041 (1992)(requiring in a *quid pro quo* claim that the plaintiff's reaction to the harassment have affected tangible aspects of employment and permitting employer to rebut plaintiff's allegations by showing that the harassment had no tangible affect on terms and conditions of employment); *Cram v. Lamson & Sessions Co.*, 49 F.3d 466, 473 (8th Cir. 1995)(employee must prove that "submission to the unwelcome advances was an express or implied condition for receiving job benefits or her refusal to submit resulted in a tangible job detriment"); *Sauers v. Salt Lake County*, 1 F.3d 1122, 1127 (10th Cir. 1993)(claim for *quid pro quo* harassment may lie only "[i]f the plaintiff can show that she suffered an economic injury from her supervisor's actions"); *accord Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1414 (10th Cir. 1987)("[t]he gravamen of a *quid pro quo* sexual harassment claim is that tangible job benefits are conditioned on an employee's submission to conduct of a sexual nature and that adverse job consequences result from the employee's refusal to submit to the conduct"); *Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554, 1564 (11th Cir. 1987)(element of *quid pro quo* harassment claim is "that the employee's reaction to the harassment complained of affected tangible aspects of the employee's compensation, or terms, conditions or privileges of employment").

The Second Circuit has likewise consistently defined *quid pro quo* sexual harassment as requiring proof that the plaintiff was denied an economic benefit due to the rejection of a supervisor's sexual advance. *Saulpaugh v. Monroe Community Hosp.*, 4 F.3d 134, 142 (2d Cir. 1993), *cert. denied*, 510 U.S. 1164 (1994); *Kotcher*, 957 F.2d at 62; *Carrero v. New York City Housing Authority*, 890 F.2d 569, 579 (2d Cir. 1989). Although the Second Circuit, in *Karibian v. Columbia University*, 14 F.3d 773 (2d Cir.), *cert. denied*, 512 U.S. 1213 (1994), held that loss of an economic benefit is unnecessary where the employee has submitted to the supervisor's sexual demands, the court specifically stated that this holding was consistent with *Kotcher* and *Carrero*. 14 F.3d at 778-79. Thus, it appears that the Second Circuit also requires either submission to a supervisor's sexual advances or a tangible job detriment in order to make out a *quid pro quo* claim.

C. Only The Third And Ninth Circuits Have Defined *Quid Pro Quo* Harassment As Requiring Only A Threat, And They Have Done So In Cases Where The Definition Was Not Relevant To The Holding Of The Cases

Only the Third and Ninth Circuits have defined *quid pro quo* harassment as requiring only a threat of adverse job consequences. Both circuits have done so in cases that did not involve solely threats, thus the definitions they adopted were not determinative to the holdings in those cases. *See Robinson v. City of Pittsburgh*, 120 F.3d 1286 (3d Cir. 1997) (*quid pro quo* evidence was sufficient where supervisor blocked plaintiff's transfer); *Heyne v. Caruso*, 69 F.3d 1475, 1478 (9th Cir. 1995); *Nichols v. Frank*, 42 F.3d 503, 511 (9th Cir. 1994). *Robinson*, *Heyne* and *Nichols* all involved circumstances where the employee either submitted to the

supervisor's sexual advances or was subjected to adverse employment consequences. *Robinson*, 120 F.3d at 1298-1299; *Heyne*, 69 F.3d at 1478-79; *Nichols*, 42 F.3d at 513. The Seventh Circuit is therefore the first circuit court to actually recognize a *quid pro quo* harassment claim where the plaintiff neither submitted to the advances nor suffered tangible effects on the terms and conditions of employment.

CONCLUSION

The judgment of the court of appeals on the issue before this Court should be reversed.

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October Term, 1997

BURLINGTON INDUSTRIES, INC.,

Petitioner,

vs.

KIMBERLY B. ELLERTH,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

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STATEMENT OF THE CASE

A. Statement of the Facts

Respondent, Kimberly B. Ellerth was employed by petitioner, Burlington Industries, Inc. from mid-March, 1993 until May 31, 1994 as a Merchandising Assistant and then as a Sales Representative at the Chicago, Illinois office. (JA99, JA118, JA121.)[1] During Ellerth's job interview with Ted Slowik, Vice President of Sales and Marketing for Burlington's Mattress Ticking Division, Slowik asked Ellerth if she was married, if she was planning on having a family, and if she was "practicing" to have a family, and stared at Ellerth's breasts and legs for "constant" and "prolonged periods of time." (JA18-21, JA31-33.) Ellerth understood Slowik's question regarding "practicing" to have a family to refer to her sexual relationship with her husband and she took great offense at that inquiry. (JA20-21, JA152.)

As a Merchandising Assistant, Ellerth reported to Mary Strenk Fitzgerald, National Accounts Manager, who, in turn, reported to Slowik. Ellerth was required to speak with Slowik by telephone about once per week. (JA119-120.) There were sexual innuendoes by Slowik in "all phone conversations" with Ellerth, such as: "How are those legs of yours, Kim, ha, ha, ha" "Are you still practicing to have a family with your husband?" and "It must be hard for a woman like you, Kim, to have a job like that — a woman with great legs."[2] Ellerth testified that "every time [she] was on the phone with [Slowik she] ended up most — in tears." (JA71.) During Ellerth's summer 1993 New York training trip, Slowik told her several offensive sexual jokes. (JA21-22.) At a lunch meeting, attended by Angelo Brenna, Vice President of International Sales, Slowik told approximately twenty offensive sexual jokes about

---

1. References in this brief to "JA" followed by a number or numbers are intended to refer to a page or pages in the Joint Appendix filed by Petitioner on March 4, 1998.

2. JA45-47, JA52, JA56, JA137, JA168, JA170.

"breasts, sex acts, along those lines."[3] During one of these jokes, Slowik reached over and grabbed Ellerth's knee under the table, causing Ellerth to pull her knee away. Ellerth found Slowik's touching of her knee to be highly offensive and unwelcome. (JA27-29, JA154, JA164.) On the walk back to the office from the New York lunch meeting, as Ellerth walked three to four feet ahead of Slowik and Brenna, Slowik stated, "you have got great legs, Kim. What do you think Angelo [Brenna]?" Ellerth turned to see that Slowik was staring at her legs as he made this comment. Ellerth felt "humiliated" and "degraded" by the comment, and kept walking. Brenna made a response to Slowik's comment about Ellerth's legs, and Slowik continued his dirty joke-telling. (JA29-31, JA133, JA148, JA154, JA165.)

During Ellerth's training trip to Greensboro, North Carolina, in the summer of 1993, and in front of a Sales Representative named Dan and Dan's wife, Slowik made a series of "sexually offensive" comments about a waitress which offended and embarrassed Ellerth. Later, Slowik invited Ellerth to the hotel lounge; Ellerth felt compelled to accept the invitation since she was on a business trip for Burlington and Slowik was her supervisor. At the hotel lounge, Slowik remarked to Ellerth that the all-female band members had nice breasts and legs as he gazed at length at Ellerth's own. Regarding breasts, Slowik stated, "[y]ou are a little lacking in that area, aren't you, Kim?" Ellerth was very humiliated and offended by this comment. When Ellerth did not respond positively to Slowik's sexually offensive behavior, Slowik told her that she should "loosen up." While exiting the lounge to go to their hotel rooms for the night, Slowik told Ellerth, "[y]ou know, Kim, I could make your life very hard or very easy at Burlington." Ellerth understood Slowik to clearly imply that she would have to engage in sexual relations with him in order to succeed in the business. (JA33-44, JA155-156, JA165-168.)

In October 1993, at the Chicago, Illinois, office, Slowik used Ellerth's chair and desk while placing some telephone calls and

3. JA23-29, JA44-45, JA132, JA148, JA154, JA164.

stated to Ellerth, "it's nice to have my butt where your butt was, Kim." Also in the fall of 1993, while Ellerth was folding fabric samples on the floor for a meeting with a client, Slowik approached her with Laura Peffal, a Customer Service Representative, and stated to Ellerth (from an upright position and while Ellerth was already on her knees), "on your knees again, Kim." Ellerth understood this comment to be a reference to fellatio.[4] (JA47-49, JA157, JA169.)

At Burlington's holiday party in December, 1993, Slowik walked by Ellerth and patted her butt with his hand, which her husband, Steve Ellerth, witnessed. Also at this company party, Slowik approached Ellerth's husband, patted him on the shoulder and stated, "you are a lucky man to have a woman like that," as he looked at Ellerth's legs and "rear end." (JA52-56, JA170.)

At Slowik's March 15, 1994 promotion interview of Ellerth in Des Plaines, Illinois, Slowik told Ellerth that he "had [his] hesitations about having [Ellerth] in this [Sales Representative] position." Ellerth confronted Slowik by stating, "I heard you called me arrogant," and Slowik answered, "[y]es, I did." When Ellerth asked, "[i]s it because I'm not loose enough for you, Ted?" (referring to Slowik's instruction at the hotel lounge for Ellerth to "loosen up"), Slowik answered "yes." Ellerth understood Slowik to mean that she was not sexually loose enough for him, especially since Slowik then reached over and rubbed her knee. Ellerth pulled

4. Ellerth recalled other incidents from March 1993 to December 1993 where Slowik made sexually harassing comments to her, both in person and on the phone, but could not recount the specifics of those incidents. (JA52, JA157, JA169.)

Although the district court ruled that pre-December 20, 1993 comments did not fall within the "continuing violation" doctrine, it made clear that "this does not require that an 'iron curtain' be dropped on December 20, 1993, shielding from consideration all evidence of Slowik's conduct before that day. . . .". (Pet. App. 261a.) The district court further stated that it would be "absurd to conclude that Slowik's conduct after December 20, 1993 had to be evaluated in a vacuum and without the context of his prior conduct." (Pet. App. 262a.)

her knee away. Ellerth was very embarrassed and humiliated by Slowik during this interview.[5] About two weeks after this promotion interview, Slowik telephoned Ellerth and told her that he was promoting her because a supervisor subordinate to Slowik wanted her in the position. Slowik also commented, "you're gonna be out there with men who work in factories, and they certainly like women with pretty butts/legs." Ellerth was crying by the time she hung up the telephone.[6] (JA68-71, JA159-160, JA173.)

In March, 1994, Ellerth travelled to a San Francisco, California bedding conference to be trained as a Sales Representative. Slowik ignored Ellerth for the first three to four days of the conference because she "had not responded favorably to his sexual harassment."[7] Slowik finally spoke to Ellerth by making a sexually inappropriate comment about her "ass" while he stopped and stared "in a very sexual way" "for a prolonged period of time" at Ellerth's "back end." (JA71-76, JA143, JA160, JA174.)

In April, 1994, Slowik told Ellerth (who is blonde) an offensive joke about a blonde, a limo and sex: "What's the difference between a blonde and a limo? Not everyone's been in a limo." (JA76, JA160, JA174.)

During a telephone call in May, 1994, when Ellerth made a business inquiry to Slowik seeking permission to insert a customer's logo into fabric, Slowik responded "I don't have time for you right now, Kim — unless you want to tell me what you're wearing." Ellerth declined to do so, said she had to go and hung up. Ellerth understood that Slowik wanted her to tell him she was wearing a

5. JA57-59, JA64-68, JA121-123, JA159, JA172.

6. After her promotion to Sales Representative, Ellerth reported to Patrick Lawrence, National Sales Coordinator, who reported to Slowik. (JA60, JA121, JA123.)

7. JA71-72, JA143, JA173; Doc. 18, Ex. C, pp. 218-219, 222, 224. References in this brief to "Doc." followed by a number are intended to refer to the document filed in the district court and referenced by that number in the Civil Docket Sheet reproduced at JA1-9 of the Joint Appendix.

"nighty [sic] or something" or "a short skirt . . . or something that would give him a little thrill during the day." (JA77-78, JA80, JA82-84, JA174.) A day or two later, when Ellerth had to call Slowik back again for permission to fill the customer's request, Slowik refused and asked, "are you wearing shorter skirts yet, Kim, because it would make your job a whole heck of a lot easier." This conversation made it clear to Ellerth that she "was not going to be going forward in [her] job and [the] sexual harassment was going to continue by Mr. Slowik." Ellerth resigned her position at Burlington shortly after this telephone call.[8]

During her fourteen months of employment at Burlington, Ellerth complained about Slowik's sexual harassment to a number of managerial and non-managerial employees. In early 1994, Ellerth complained to Donna Thibideau, Customer Service Manager, about Slowik's sexual harassment. In response, Thibideau informed Ellerth that another employee, Ann Pillow, might also have been sexually harassed by Slowik.[9] After the New York lunch meeting with Slowik and Brenna in the summer of 1993, Ellerth complained to Laura Peffal, a Customer Service Representative, and another employee, Marilyn, about Slowik's behavior. Both employees responded that Ellerth's complaints sounded "typical" of what occurred when Slowik and Brenna got together.[10] The week after the San Francisco conference, Ellerth complained to Patrick Crosson, a Sales Representative, about Slowik's sexual harassment and discussed Slowik's possible sexual harassment of Pillow. Crosson told Ellerth that Slowik and Patrick Lawrence, another supervisor, had asked him whether Ellerth was planning on having a family in the near future.[11] Ellerth also complained about Slowik's sexual comments and actions to Sherry Hester, a

8. JA15, JA79-85, JA175; Doc. 18, Ex. C., p. 273.

9. JA107-108, JA148, JA171; Doc. 18, Ex. C, pp. 176-80; Doc. 14, Ex. B, no. 6.

10. JA106-107; Doc. 18, Ex. C, p. 83.

11. JA104-105, JA148; Doc. 18, Ex. C, p. 179, 218-19, 222, 224; Doc. 14, Ex. B, no. 6.

Customer Service Representative and to Brent Schneider, a Sales Representative.[12] In addition, at least three employees, including a vice president, witnessed Slowik's sexual harassment of Ellerth first-hand.[13]

Ellerth contemplated incorporating in her May 31, 1994 resignation letter further complaints about the sexual harassment, but, out of fear of retaliation, she removed those references with correction fluid.[14] About two weeks later, Ellerth sent a second letter to Lawrence stating, in part:

> I briefly mentioned [the real reason why I quit] in my [resignation] letter, but I did not get into it because I was afraid to. Before I was hired, you and I spoke about the reasons why Ted [Slowik] didn't feel comfortable around me. I told you that he had said some sexually inappropriate things to me in the past. What I didn't tell you was that he had, on two occasions, patted my rear, and every time he saw me looked me up and down like a piece of meat. . . . On my first trip to N.C. to train . . . [I was] very upset because [Slowik] kept making sexual comments about the women on the stage [at the hotel lounge]. We got up to leave and as we were walking out, he patted my rear and said he could make my life at Burlington very easy or very hard. . . . This is why Ted "couldn't put his finger" on why he did not want me to have the job. . . . I don't expect you to do anything about this because as I had been told

12. JA105, JA108-109, JA148; Doc. 18, Ex. C, p. 180, 218-19, 222, 224; Doc. 14, Ex. B, no. 6.

13. Brenna (Vice President of International Sales), Laura Peffal, and Dan (last name not identified), a Sales Representative. Ellerth also told her husband, her parents, and a Burlington customer, Cara Jimenez, about the sexual harassment as it was occurring. (JA148-149; Doc. 18, Exs. C pp. 187-88, F, G, H; Doc. 14, Ex. B, no. 6.)

14. JA10-14, JA99-103, JA109-110, JA114-115, JA161; Doc. 14, Ex. D3.

> before. Ted is just Ted. My entire time at Burlington, I had to ignore Ted [Slowik] and try to do what I needed to do in my job. But I finally had it when I spoke to Ted on the phone during my last weeks and he said to me, "This job must be hard for a woman like you." I replied, "like what?" He then said, "An attractive woman with great legs; you should wear shorter skirts." Ted made my life with Burlington unbearable. I just thought you should know, although I'm sure you are not surprised.

(JA15-16, JA126-127, JA161.)

Although petitioner now argues that Ellerth's "resignation" on May 31, 1994 was related to work performance issues, respondent introduced evidence below that controverted this claim.[15]

B. Procedural History of the Case

Ellerth brought this suit against Burlington in the United States District Court for the Northern District of Illinois, Eastern Division, alleging sexual harassment and constructive discharge under Title VII of the Civil Rights Act of 1964, as amended, November 21, 1991, 42 U.S.C. § 2000e, *et seq.* ("Title VII"). The district court's jurisdiction over the case was under 28 U.S.C. § 1343(4).

Burlington moved for summary judgment against Ellerth in the district court claiming that: (1) the "hostile work environment" sexual harassment was not sufficiently severe or pervasive; (2) Burlington was not liable for the "hostile work environment" or the "*quid pro quo*" sexual harassment against Ellerth; and (3) Ellerth was not constructively discharged.

The district court held that it had "little difficulty in concluding that Ellerth has raised a genuine issue of material fact as to whether she was subjected to a hostile work environment as a result of Slowik's conduct." (Pet. App. 262a-263a.) Regarding "quid pro

15. JA85-97, JA123-125, JA160; Doc. 18, Ex. J, no. 4.

quo" sexual harassment, the district court held that Ellerth, in labeling her allegation "sexual harassment" in her charge of discrimination, had failed to state a separate claim for "quid pro quo" sexual harassment. In so ruling, however, the district court acknowledged that "imbedded in Slowik's harassment of Ellerth is a quid pro quo proposition." (Pet. App. 216a-217a, 219a-220a, 264a, 284a.) The district court granted Burlington's summary judgment motion, concluding that the common law of agency did not lead to employer liability in the context of "hostile work environment" sexual harassment.[16] (Pet. App. 261a-280a, 283a-286a.)

Ellerth appealed the district court's ruling to the United States Court of Appeals for the Seventh Circuit, which reversed the district court decision in its entirety. Judges Bauer, Rovner and Diane P. Wood held that: (1) Ellerth had properly plead both "types" of sexual harassment as no requirement existed that complainants plead the judicially-created sub-theories of sexual harassment at the time of their charge of discrimination; and (2) Burlington was liable for both "types" of sexual harassment by Slowik under a "scope of authority" analysis.[17] *See* Restatement (Second) of Agency, § 219(1). (Pet. App. 219a-221a, 230a-231a.)

Burlington thereafter filed a petition for rehearing *en banc*, which, after briefing, was granted by the Seventh Circuit, vacating the three-judge panel decision. Nine of the twelve judges of the *en*

16. Restatement (Second) of Agency (1958). While acknowledging that "quid pro quo" sexual harassment "has generally been treated as giving rise to strict liability on the part of the employer," the district court concluded, in dicta, that agency principles similarly did not lead to employer liability for "quid pro quo" sexual harassment. The district court then granted summary judgment on Ellerth's constructive discharge claim because "Slowik's conduct cannot be imputed to Burlington." (Pet. App. 286a.)

17. The Seventh Circuit's decision did not explicitly address Ellerth's constructive discharge claim, but remanded the case for further proceedings consistent with its opinion that liability could be imputed to Burlington for the supervisory sexual harassment. (Pet. App. 239a.)

banc panel affirmed the prior decision holding Burlington liable for the "quid pro quo" sexual harassment against Ellerth. While the three-judge panel had held Burlington liable for sexual harassment under a "scope of authority" analysis, the majority of the *en banc* panel held Burlington liable for the "quid pro quo" sexual harassment under either a "delegated authority" or a "scope of authority" theory.[18] (Pet. App. 6a-7a, 173a.) The majority of the *en banc* panel maintained the judicially-created distinction between "hostile work environment" and "quid pro quo" sexual harassment, while Judges Wood, Easterbrook and Rovner did not separate Ellerth's claims into these two separate categories of sexual harassment.[19] (Pet. App. 6a-7a, 178a-179a.)

SUMMARY OF ARGUMENT

Title VII does not create two separate and distinct legal claims — quid pro quo and hostile environment — with different liability rules and remedies. Rather, a sexual harassment plaintiff, like any other Title VII plaintiff, must establish that the discrimination complained of was action by the "employer." Only individual human beings can commit discriminatory acts; the issue under Title VII is which actions by which employees are to be treated as employer action.

The most important agency principle in Title VII cases is that employers are liable for injuries caused by supervisors who use or abuse their official powers. Restatement (Second) of Agency

18. Ellerth was held to have waived the negligence theory determined necessary to her "hostile work environment" claim by the majority of the *en banc* panel by her reference to § 219(b) of the Restatement (Second) of Agency in the three-judge panel reply brief. (Pet. App. 6a; 28a; 59a; 174a, n.1; 214a; 199a-202a.) *See* Respondent's Brief in Opposition, p. 21, n. 20; Respondent's Cross-Petition for a Writ of Certiorari, p. 21, n. 16.

19. *See* Respondent's Brief in Opposition, pp. 9-12, and Respondent's Cross-Petition for a Writ of Certiorari, pp. 6-10, for summaries of the *per curiam* and separately-authored opinions of the *en banc* panel of the Seventh Circuit.

§ 219(2)(d). It is because of this principle that employers are legally responsible if a supervisor dismisses a worker because he is black, regardless of whether such discrimination violated company policy. This doctrine is consistent with the decisions of this Court that action by government officials who abuse their authority is nonetheless state action under color of law. "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law." *United States v. Classic*, 313 U.S. 299, 326 (1941). These decisions identify the actions that are the "responsibility" of a state or its agencies for which they can "fairly be blamed." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936 (1982).

The district court correctly observed that "it was precisely the existence of the agency relationship that permitted Slowik the opportunity to exploit his position of authority and harass Ellerth." (Pet. App. 277a.) A supervisor's implied threat of dismissal is a use of his authority, even if no dismissal occurs, just as a bank robber who brandishes a gun is using that weapon regardless of whether he ever fires it. *Bailey v. United States*, 116 S. Ct. 501 (1995). This Court in *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 64 (1977), expressly rejected the contention that non "tangible" injuries should be treated differently under Title VII.

In 1991, when Congress amended Title VII to authorize awards of damages, it expressly rejected proposals to require harassment victims to utilize an employer's internal complaint procedures. Under section 706 respondent was only required to, and did, file a charge with the Illinois Department of Human Rights; Title VII does not authorize the courts or petitioner to create an additional requirement that she also file first with the Burlington Industries Department of Human Resources.

Reprisals against sexual harassment victims who complain to their employers is a serious problem. A victim who files such a complaint is gambling her job, if not her career, on the outcome.

An implicit purpose of any supervisor's threats is to deter his victim from complaining about his harassment; that victim should not be sanctioned if she submits to that demand.

The record in this case contains substantial evidence that respondent was the victim of severe and pervasive harassment, and that Slowik's actions were facilitated by abuse of his position. A finding of liability for that harassment would establish a basis as well for respondent's constructive discharge claim.

ARGUMENT

INTRODUCTION

The very language of the Question Presented posed by petitioner reflects a fundamental misconception regarding the nature of Title VII. The question framed is whether "a claim of quid pro quo sexual harassment may be stated under Title VII" in certain specified circumstances. (P.Br. i.) Petitioner's central contention is that only certain particular situations can properly be treated as a quid pro quo "claim"; all other harassment is to be classified, and treated differently, as a "hostile work environment" claim. Proceeding from the assumption that Title VII recognizes two legally distinct and mutually exclusive types of harassment claims, quid pro quo and hostile environment, each with separate rules regarding employer liability, petitioner advances arguments regarding whether the facts of this case constitute a genuine quid pro quo claim.[20] Several of the opinions in the court of appeals proceeded on the same assumption.

The actual terms of the statute, however, make no reference to either quid pro quo demands, hostile work environments, or even sexual harassment. A sexual harassment claim, like any other claim under section 703(a)(1) of Title VII, must meet three statutory requirements: (1) it must involve "discriminat[ion]" on the basis of race, color, religion, sex, or national origin; (2) the

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20. *E.g.* P.Br. 11 (discussing correct "definition" of quid pro quo harassment), 17 (paradigm of "classic" quid pro quo harassment).

discrimination[21] must affect the plaintiff's "compensation, terms, conditions, or privileges of employment"[22], including discrimination in hiring or dismissal; and (3) the discrimination must have been the act of an "employer."[23] The sufficiency of the allegations in the instant case turn on the meaning of these statutory terms, not on a debate about the distinction between the proper definitions of "quid pro quo" and "hostile work environment," phrases which only appeared in caselaw[24] and in legal and sociological literature more than a decade after the 1964 enactment of Title VII itself.[25]

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21. The anti-retaliation provision of Title VII, § 704(a), is broader than section 703(a)(1), since it prohibits *any* discrimination against applicants or current or former employees for having opposed practices made unlawful by Title VII. Section 704(a) thus covers, not only retaliatory discrimination affecting the terms and conditions of a victim's employment, but other forms of retaliation as well. *E.g. Robinson v. Shell Oil Co.*, __ U.S. __, 117 S. Ct. 843 (1997) (denial of job reference).

22. "The critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." *Oncale v. Sundowner Offshore Services, Inc.*, __ U.S. __, 66 U.S.L.W. 4172 (March 4, 1998).

23. Section 703(a)(1) states that:

> It shall be an unlawful employment practice for an employer — (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

24. The decisions of this Court, although noting that these phrases may be useful in understanding the phenomenon of sexual harassment, have not attached to the phrases any fixed, legally distinctive or mutually exclusive meanings.

25. Catharine A. MacKinnon, Sexual Harassment of Working Women: A Case of Sex Discrimination (1979).

Petitioner's brief concerns a hypothetical case in which a supervisor, although threatening a subordinate, never actually resorts to any reprisals or obtains any form of submission to his demands. Those simply are not the circumstances of this case. Slowik's threats were not limited to or focussed on dismissal of respondent; Slowik warned her that he could "make your life very hard . . . at Burlington", and he certainly made good on that threat. Slowik's demands were not limited to, indeed never specifically focussed on, sexual intercourse; his sexual interests clearly included whatever pleasure he took from touching respondent and making her listen to dirty jokes. What Slowik demanded of respondent was that she neither actively resist this conduct, e.g. by openly rebuking him or slapping him as she might a stranger on the street, nor complain to his superiors. In this regard Slowik's threats were largely successful.

Petitioner devotes much of its brief to arguing that it would be unfair to hold an employer "strictly liable" for back pay or damages under the circumstances alleged in the complaint. Petitioner, however, does not deny that the facts alleged in the complaint are sufficient to constitute discrimination, or that those facts, if proven, would establish an adverse alteration of the terms and conditions of respondent's employment. The issue here is thus only whether under the circumstances of this case the discriminatory employment practices alleged in the complaint can be said to be acts of an "employer" under Title VII. If in a given case the discriminatory actions complained of are determined not to be the actions of an "employer", then the actions would not be prohibited by Title VII at all; that would mean that the victimized employee could not obtain even injunctive or declaratory relief.[26] Thus the burden on petitioner is to establish that Title VII does not prohibit the events alleged in this case. Whether factors relied on by petitioner

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26. For example, even if a supervisor harassed an employee so severely that she resigned, a finding that the actions in question were not those of an "employer" would mean that the victim could not sue at all. The district court construed Title VII in just this manner. (Pet. App. 266a n.11, 286a-287a.)

might, following a finding of liability, be considered by the trier of fact in deciding whether to award punitive damages is at this point premature.

I.

SEXUAL HARASSMENT BY A SUPERVISOR CONSTITUTES ACTION BY THE EMPLOYER WHERE THE PERPETRATOR USES OR IS AIDED BY HIS SUPERVISORY POWERS.

A. The Action of A Supervisor Who Utilizes His Authority or Position to Engage in Sexual Harassment Or Other Discrimination is "Employer" Action Under Title VII.

The district court correctly observed that "it was precisely the existence of the agency relationship that permitted Slowik the opportunity to exploit his position of authority and harass Ellerth." (Pet. App. 277a.) That circumstance is sufficient to establish that the harassment in question was "employer" action under Title VII.

The only manner in which an employer ever acts is through the conduct of particular human beings; the question of whether a specific action is the action of an "employer" under Title VII is thus ipso facto a question about which actions of which employees should be characterized as actions of the employer. The applicable legal principles which determine the meaning of "employer," and thus the scope of Title VII's prohibitions, affect not only claims of sexual harassment, but any type of discrimination. In *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 72 (1986), this Court directed the lower courts to look to the principles of agency law in resolving under Title VII the issue of whether the particular conduct of a given supervisor or other worker is the action of an "employer."

Agency principles identify a number of distinct circumstances in which actions taken by an employee are deemed to be actions of the employer.[27] The employer is legally responsible if: (1) the

27. *E.g.* Restatement (Second) of Agency, §§ 213, 219.

employee was "aided in" his actions by his position with or relationship with the employer; (2) the employee acted within the scope of his employment[28]; (3) the employee had apparent authority to engage in the specific act in question; (4) the employer[29] had actual or constructive knowledge of the action in question; (5) the employer was negligent in failing to prevent the action in question; (6) the employer ratified the action in question.

The agency principle most often relevant to a claim of discrimination under Title VII is that which holds an employer liable for supervisors who utilize their powers or position to engage in the discriminatory actions. Restatement (Second) of Agency, § 219(2)(d). It has long been the law that "[w]here a loss is to be suffered through the misconduct of an agent, it should be borne by those who put it *in his powers* to do the wrong, rather than by a stranger." *County of Macon v. Shores*, 97 U.S. 272, 279 (1877) (Emphasis added.) This Court recognized in *Meritor* that employers are indisputably liable for discrimination in the firing of workers. 477 U.S. at 70-71[30]. A supervisor who fired a female employee

28. Petitioner suggests that an employer would obtain immunity under Title VII if an harassing supervisor deterred his victim from filing an internal complaint with the company. *See* part IV(b), *infra*. If that were indeed the law, the harassment would serve the company's interest, and thus be within the scope of the harasser's employment.

29. Application of several of these principles raise subsidiary questions concerning which employees' knowledge, negligence or ratification should be attributed to the employer.

30.

> [T]he lower courts have consistently held employers liable for the discriminatory discharges of employees by supervisory personnel, whether or not the employer knew, should have known, or approved of the supervisor's actions. *E.g. Anderson v. Methodist Evangelical Hospital, Inc.*, 464 F.2d 723, 725 (6th Cir. 1972).

Anderson imposed liability on an employer for a racially motivated discharge by "a person in authority at a lower level of management", (Cont'd)

because of her sex would obviously be "aided" in doing so by his control over personnel matters, even if sex-based dismissals were forbidden by company policy. Such a discriminatory dismissal often would not fit into any other branch of agency law; few if any companies give supervisors apparent authority to discriminate, and a supervisor who acted out of simple animus towards women — as opposed to a belief that women were inferior workers — could not readily be said to be acting to advance the interest of his employer, and thus to be within the scope of his employment.

This branch of agency law is consistent with this Court's longstanding decisions regarding when the conduct of a state employee is to be deemed the action of a state itself for constitutional purposes. Like the Title VII prohibition against discrimination by an "employer", section 1 of the Fourteenth Amendment only forbids denials of equal protection and due process by a "state." This Court's analyses of what conduct by a government employee is "state" action, or "under color of law," delineate the actions that "can fairly be attributed to the State," *West v. Atkins*, 487 U.S. 42, 55-56 (1988), and identify the conduct which is the "responsibility" of a state or its agencies for which they can "fairly be blamed." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936 (1982); *see id.* at 928-29 (in case of government official, state action and under color of law requirements "are identical"). The Fourteenth Amendment only has operative effect by acting

> upon persons, not upon the abstract thing denominated a State, but upon the persons who are

(Cont'd)
despite the fact that "upper management" was "exemplary." 464 F.2d at 724; *see Henson v. City of Dundee*, 682 F.2d 897, 909 (11th Cir. 1982) ("The reason for this stern rule is readily apparent: ['] When [the employer gave] its [supervisory personnel] authority to fire employees, it also accepted responsibility to remedy any harm caused by [the supervisors'] unlawful exercise of that authority. The modern corporate entity consists of the individuals who manage it, and little, if any, progress in eradicating discrimination in employment will be made if the corporate employer is able to hide behind the shield of individual action[']").

> the *agents* of the State in the denial of the rights which were intended to be secured.

Ex parte Virginia, 100 U.S. 339, 347 (1879) (Emphasis added). Although the principles in these cases may not be applicable in every particular to the analogous issue under Title VII, they provide an established and familiar body of caselaw to which the courts should look in determining when the action of a supervisor or other worker is "employer" action.

Action by a state violative of the Fourteenth Amendment occurs whenever a state worker

> *by virtue of public position* under a State government, deprives another of property, life, or liberty, without due process of law, or denies and takes away the equal protection of the laws. . . .

Ex parte Virginia, 100 U.S. at 347. The existence of state action is particularly evident "if the act be one which there would not be opportunity to perform but for the possession of some state authority." *Home Tel. & Tel. Co. v. Los Angeles*, 227 U.S. 278, 289 (1913).

Where a state employee has utilized his position to engage in the conduct complained of, state action is present regardless of whether that use of authority may have been an ab*use* of his position. The "state" actions forbidden by the Fourteenth Amendment include actions

> where one who is in possession of state power *uses* that power to the doing of wrongs which the Amendment forbids even although [sic] the consummation of the wrong may not be within the powers possessed if the commission of the wrong itself is rendered possible or is *efficiently aided* by the state authority lodged in the wrongdoer.

Home Tel. & Tel. Co. v. Los Angeles, 227 U.S. at 287 (Emphasis added).[31] If such a misuse of state power has occurred, "the

31. *Id.* at 288 ("a state officer cannot on the one hand as a means (Cont'd)

actions of a state officer who exceeds the limits of his authority constitute state action for purposes of the Fourteenth Amendment." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 929 (1982). The Fourteenth Amendment constraints on the states encompass a "right not to be deprived of life or liberty by a state officer who takes it by *abuse* of his office and its power." *Screws v. United States*, 325 U.S. 91, 134 (1945) (Rutledge, J., concurring in result) (Emphasis added).

"Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law." *United States v. Classic*, 313 U.S. 299, 326 (1941). In *Monroe v. Pape*, 365 U.S. 167 (1961), this Court expressly held that abuse of authority by a state official constituted state action under color of law regardless of whether it also violated express state statutes and constitutional provisions; the commands of the Fourteenth Amendment, enforceable in a civil action under section 1983, apply to "those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it." 365 U.S. at 172. "It is firmly established that a defendant in a § 1983 suit acts under color of state law when he abuses the position given to him by the State." *West v. Atkins*, 487 U.S. 42, 49-50 (1988).

The same principles have been applied by this Court in delineating the scope of the Fourth Amendment prohibition against unreasonable searches and seizures by the federal government. In *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), this Court recognized that government action had occurred despite the fact that the Fourth Amendment had stripped the federal employees in question of any legal authority to conduct the type of search alleged.

(Cont'd)
of doing a wrong forbidden by the Amendment proceed upon the assumption of the possession of state power and at the same time for the purpose of avoiding application of the Amendment, deny the power and thus accomplish the wrong.")

> Respondents seek to treat the relationship between a citizen and a federal agent unconstitutionally exercising his authority as no different from the relationship between two private citizens. In so doing, they ignore the fact that power, once granted, does not disappear like a magic gift when it is wrongfully used. An agent acting — albeit unconstitutionally — in the name of the United States possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own.

403 U.S. at 391-92.

The subtle but effective manner in which official power can be misused is illustrated by *Evans v. United States*, 504 U.S. 255 (1992). The defendant in that case was convicted under the Hobbs Act for "obtaining of property from another . . . induced . . . under color of official right." 18 U.S.C. § 1951(b)(2). In upholding that conviction, this Court ruled irrelevant the fact that both the defendant county official and the apparent victim, an undercover FBI agent, well knew that the defendant's proposed actions, to be taken in return for $7000 in cash, would be an abuse, not a legitimate exercise of, his government authority. Extortion "under color of official right" occurs even when it is clear to all that the public official has no legitimate claim to receive payment in return for the promised actions; the law requires only that "the services for which the fee is paid must be official and that the official must not be entitled to the fee". 504 U.S. at 270. Indeed, by definition a violation of § 1951(b)(2) occurs only when the receipt of a payment in return for the promised action is *not* authorized by law. In *Evans* no explicit threat or promise regarding the use of state power was necessary to sustain a conviction; that the money had been obtained "under color of official right" was demonstrated merely by "an implicit promise." 504 U.S. at 257. *See Amos v. United States*, 255 U.S. 313, 317 (1921) (where warrantless government agents "deman[d] admission to make search . . . under Government authority," the "implicit coercion" precludes any claim that resident waived rights by admitting them).

These principles were well established when Title VII was first enacted, and provided the familiar standard for determining whether a discriminatory act by a state supervisor would be deemed an action by the state agency for which he or she worked. In extending to certain private employers the anti-discrimination principle that grew out of *Brown v. Board of Education*, 347 U.S. 483 (1954), there is no indication that Congress intended to direct the courts to fashion some different agency doctrine. When Congress in 1972 made Title VII applicable to the states themselves, it did so by redefining "employer" in section 701 to include "governments," "governmental agencies" and "political subdivisions." It is unlikely that Congress intended that the courts, in determining whether the actions of a government supervisor were actions of a government under Title VII, were to use — indeed create — a standard different than that which had long been applied in resolving the same issue under the Fourteenth Amendment and section 1983. Nothing on the face of the 1972 amendments to Title VII suggests that Congress wanted the scope of the protections in section 703 to depend on whether the alleged victim worked for a state or local agency rather than a private firm.

A key effect of the 1972 amendments to Title VII was that the monetary relief awarded to a discrimination victim would be paid directly out of government funds, rather than being awarded against the discriminatory government official. In section 1983 actions at that time monetary awards were made only against the responsible official, although in practice most such defendants were indemnified by their employers.[32] But there is no indication that in providing for a different named defendant in Title VII actions Congress meant implicitly to redefine what conduct was official action, and thus forbidden, by the prohibition against intentional discrimination found in Title VII and the Fourteenth Amendment alike. When

32. *See* Brief for Respondent, *Bogan v. Scott-Harris*, __ U.S. __, 66 U.S.L.W. 4163 (March 3, 1998) Appendix A (listing indemnification statutes).

Congress wanted to place in Title VII limitations on the availability of monetary relief, it has done so expressly.[33]

B. Harassment Accomplished By Means Of Threats of Official Action Involve Utilization of Official Authority or Position.

The form of official power most commonly utilized to engage in sexual harassment is a contingent threat by a supervisor to use his powers against his victim if the victim takes or refuses to take certain action.[34] Petitioner is correct in asserting that such supervisory threats — explicit or at least implicit — are a widespread phenomenon in sexual harassment. (P.Br. 25.) Such threats are used in particular to coerce victims into: (a) cooperating in a sexual act ("Come to my hotel room and have sex or I will fire you"); (b) not resisting a sexual contact ("If you scream when I grope you I will fire you"); and (c) not complaining ("If you tell anyone I did this I will deny it and then fire you"). The third threat is almost invariably at least an implicit part of any other threat — few if any harassers want to be punished for, or even charged with, that misconduct. A harassment victim understands that her harasser wants her to not complain just as the parents of a kidnapped child understand that the kidnapper does not want to be paid in marked bills.

If a supervisor threatens to fire a subordinate if she refuses to have sex with him, the supervisor's use, albeit abuse, of his official power is manifest. Surely, if a judge extorted sex from a woman by threatening to rule against her in a child custody dispute, that conduct would be state action under color of law, even if the judge never ruled on the custody dispute at all. *Cf. United States v. Lanier*. __ U.S. __, 117 S. Ct. 1219 (1997). If Slowik and respondent had worked for the city of Chicago, and Slowik had obtained

33. *E.g.* 42 U.S.C. § 1981A(b)(3).

34. The district court correctly observed that "the facts of this case . . . as with so many of these cases, . . . strikingly illustrate that . . . the nation's workplaces are still filled with those who are all too eager to exploit their positions of authority. . . ." (Pet. App. 285a.)

money from her by promising that the payment would make her job "a whole heck of a lot easier," that would constitute extortion "under color of official right", in violation of the Hobbs Act. The same acts by Slowik that would be state action if engaged in by a city supervisor are, at least in this respect, the actions of an "employer" under Title VII.

The district court had no doubt that a reasonable jury could have interpreted Slowik's remarks as embodying such threats. (Pet. App. 263a-264a.) This Court's decisions make clear that an official can easily abuse his power without making any explicit threat. *Evans v. United States*, 504 U.S. at 266 n. 17 (Hobbs Act "does not require that affirmative inducement be proven"); *Amos v. United States*, 255 U.S. 313 (1921) (mere demand for entry by warrantless government agents was inherently coercive). Extortion is "under color of official right," so long as the victim reasonably believes that the payment will prevent official reprisal or obtain official favors. Implicit threats and obvious inherent dangers can intimidate a subordinate as effectively as express threats.

> Implicit quid pro quo harassment is a most serious matter. It is far more likely to take place than is the explicit variety. As time goes by and harassers learn that they can no longer victimize their prey at will, their actions become less overt.

Nichols v. Frank, 42 F.3d 503, 512 (9th Cir. 1994). Supervisors typically exercise broad discretionary powers over their subordinates; supervisors and subordinates alike understand full well that a subordinate who incurs the displeasure of his or her superior for any reason is likely to find his or her employment made unpleasant, if not terminated. The very nature of a supervisor's actions may demonstrate to his victim, and to a trier of fact, that he is exploiting a legitimate fear of retaliation. If a zoning official were to ask for a $10,000 "gift" from a businessman with a pending rezoning request, but with no prior personal relationship to the official, that act would be difficult to understand as anything other than a contingent promise of favoritism or threat of reprisal. If a supervisor makes lewd

remarks to or touches in a sexual manner a subordinate with whom he has no consensual intimate relationship, he is likely to be exploiting quite deliberately her fears of retaliation[35] if she should resist, respond with the sort of abrupt rejection that she might direct at a stranger on the street, or attempt to complain.

Although a threat of dismissal obviously involves a use of official power, it does not follow that *all* threats — or that all circumstances that might be described as quid pro quo propositions — involve such a use of authority. No such use would be involved if, without more, a supervisor attempted to extort sex by threatening to exclude his target from his carpool, to take her off his Christmas card list, or to vandalize her car. Threats by the peer of a victim often if not ordinarily would not involve exploitation of the perpetrator's authority as an employee. Only if one specifically defines a quid pro quo demand to refer only to a demand involving a use of agency powers would it necessarily be true that such a demand should be deemed the action of the employer.

Conversely, it is not the case that *only* quid pro quo demands for sexual intercourse involve a use of official power. The same power is utilized, for example, where a supervisor invokes or relies on fear of retaliation to deter a victim from resisting or complaining about groping or lewd remarks. As Judge Wood noted in the court below

> When [a] supervisor bombards an unwilling subordinate with unwanted sexual images, touching, vulgar words, or denigrating comments, only the most committed formalist would feel confident in saying when those actions cross from the imaginary line from "hostile environment" harassment to "quid pro quo" harassment. . . . The critical question, for purposes of employer liability, turns on whether the

35. Female workers frequently face retaliation when they fail to respond positively to sexual advances by their supervisors. *Chamberlain v. 101 Realty, Inc.*, 915 F.2d 777 (1st Cir. 1990); *Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554 (11th Cir. 1987).

> supervisor has abused the powers the employer has entrusted to him; it does not turn on the way in which the supervisor has decided to abuse them.

(Pet. App. 177a-178a.) More broadly, a supervisor may as a practical matter use his authority in any number of ways to accomplish or facilitate the sexual harassment of his victim.[36]

On the other hand, the fact that a supervisor's conduct involves an exercise of official power does not mean that actionable sexual harassment will have invariably occurred. The use of that power simply puts the perpetrator — for Title VII purposes — in the same position as the owner-operator of a sole proprietorship. No Title VII violation occurs unless the use of that power — the employer action — results in a discriminatory alteration of the terms or conditions of the victim's employment. If a supervisor — indeed, a company president — summoned a worker to his office on one occasion, and told a single off-color joke, such an isolated incident — even though the act of the employer for Title VII purposes — would not be sufficient to alter the terms and conditions of her employment. Where a supervisor makes some form of contingent threat to facilitate an act of sexual harassment, a statutory violation occurs so long as either the threatened retaliation, the intended harassment, or the effect of the threat itself would be serious enough to alter the terms and conditions of the victim's employment.[37]

The district court below properly recognized as well that threats by themselves could in some situations alter the terms and conditions

36. *E.g. Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437 (10th Cir. 1997) (supervisor ordered victim to accompany him to an isolated part of a mine where he harassed her); *Henry v. Gehl Corp.*, 867 F. Supp. 960 (D. Kan. 1994) (supervisor directed victim to stand up in front of male co-workers and then made offensive comments about her anatomy); *Rauh v. Coyne*, 744 F. Supp. 1181 (D. D.C. 1990) (supervisor by using a key possessed only by supervisors gained access to restricted area in which victim worked, and then exposed himself).

37. The legality of the conduct under Title VII should not depend on how the victim responded to the threat.

of a victim's employment. (Pet. App. 264a-66a.) Certainly daily express threats to dismiss all black or female workers would be as injurious as the harassment in *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993). Similarly, if a supervisor warned a subordinate, "I will dismiss you if you don't have sex with me in the next 100 days," the fact that the victim had to live in fear of dismissal, or in the shadow of such a ghastly choice, would obviously be a material and adverse alteration in the terms and conditions of the subordinate's employment.

II.

UNREALIZED THREATS OF AN ABUSE OF OFFICIAL POWER CONSTITUTE EMPLOYER ACTION.

Petitioner acknowledges that a harassing supervisor who actually employs his official powers to retaliate against a non-compliant, resisting or complaining victim "uses" his authority as an agent of the employer. (P.Br. 21, 22.) But, petitioner insists, if the supervisor makes but does not carry out a threat to misuse his officials powers, no use of that authority has occurred at all. Rather, it maintains, such a supervisor — like, apparently, a supervisor who never makes any threats at all, but only daydreams about sexual harassment and retaliation — has merely "contemplate[d]" misusing those powers. (P.Br. 22.)

If, as petitioner urges, an unrealized threat of a use of official power is not a use of that power at all, then no use of such power would be involved if the threat went unrealized because the victim had actually submitted to the demands of the threatening supervisor.[38] Consider a situation in which a supervisor calls in

38. It is somewhat unclear whether on petitioner's view there would be a Title VII violation, and employer liability, if a supervisor extorted sex from a subordinate by threatening to fire her. *Compare* P.Br. 16, 18, 31 (employer liable only if supervisor's retaliation injures tangible job benefit) *with id.* at 16, 34 (employer apparently liable in a (Cont'd)

three women and announces that he will fire them unless someone agrees to have sex with him at once; the first victim refuses and is dismissed on the spot, the second agrees and submits, and the third woman is spared the horrible choice. On petitioner's view no violation of the Title VII rights of the second and third woman would have occurred.

Petitioner's proposed distinction is patently at odds with the normal meaning of the word "use." An armed desperado who shouts "Your money or your life!" is using his weapon in precisely the way that a blackmailer uses embarrassing information to extort money. Petitioner suggests that an unrealized threat should be dismissed as mere "sabre rattling" (Pet. Br. 13, 23); but the rattling of a real sabre has serious legal consequences. A ne'er-do-well who goes into a bank and demands $10,000 will simply be asked to leave; but if he asks for the money while wearing and rattling an actual sabre, he is likely to be arrested for a felony, even if the teller never handed him any money. No one would seriously argue that a bank robber brandishing an automatic weapon does not "use" a gun unless he actually fired a round at a guard or a teller. *Bailey v. United States*, 116 S. Ct. 501 (1995).[39] The power of a

(Cont'd)
submission case). If on petitioner's view there is employer liability in a submission case, that would be dispositive of the instant appeal, since a reasonable jury clearly could conclude that Slowik got at least part of what he wanted when respondent neither vociferously rebuked nor effectively complained about his actions.

39. In *Bailey* this Court held that 18 U.S.C. § 924(c)(1), which imposes a minimum 5 year sentence on a person who "uses . . . a firearm" while committing certain crimes, requires proof of "active employment of the firearm", 116 S. Ct. at 506, such that the firearm was "an operative factor in relation to the predicate offense." 116 S. Ct. at 505. But no member of the Court suggested that that meant the defendant must have actually fired the weapon.

> The active-employment understanding of "use" certainly includes brandishing, displaying, bartering, striking with, and most obviously, firing or attempting to fire, a

(Cont'd)

harassing supervisor to retaliate against a victim who resists or complains is not a concealed weapon; it is on the table all the time. "Any subordinate knows that the boss is the boss whether a file folder or a dinner is at issue." *Tomkins v. Public Service Electric & Gas Co.*, 422 F. Supp. 553, 557 (D. N.J. 1976), *rev'd on other grounds*, 568 F.2d 1044 (3d Cir. 1977).

Petitioner's argument is reminiscent of the long discredited doctrine that proof of rape requires evidence that the victim had put up a sufficiently vigorous physical defense to sustain demonstrable injuries. On that view a woman who yielded to overwhelming, even potentially lethal physical force was deemed not to have been raped at all, just as, on petitioner's view, a woman who submits to extortionate demands rather than daring her boss to fire her has not experienced a violation of her Title VII rights. But today rape law is otherwise. A man who, when proposing a sexual act to his date, mentioned that he was "contemplat[ing]" strangling her if she refused, would be guilty of a serious criminal act.[40]

(Cont'd)

> firearm. . . . [A] reference to a firearm calculated to bring about a change in the circumstances of the predicate offense is a "use", just as the silent but obvious and forceful presence of a gun on a table can be a "use."

116 S. Ct. at 508. On the other hand, "[i]f the gun is not disclosed or mentioned by the offender, it is not actively employed, and it is not 'used' ". *Id.*

40. Under Illinois law, for example, a defendant is guilty of criminal sexual assault if he "commits an act of sexual penetration by the use of force or threat of force." ILCS 5/12-13(a)(1). "Force or threat of force" is defined to include circumstances in which "the accused threatens to use force or violence on the victim . . . and the victim under the circumstances reasonably believed that the accused had the ability to execute that threat." ILCS 5/12-12(d)(1). Aggravated criminal sexual assault occurs if, in connection with a criminal sexual assault,

> the accused displayed, threatened to use, or used a dangerous weapon or any object fashioned or utilized

(Cont'd)

The pivotal legal distinction proposed by petitioner among reprisals, submission and simple threats would often be difficult to administer. It would be necessary in each case to determine whether a particular action was intended by the perpetrator as a form of retaliation, or was regarded by him as an act of submission. If, for example, Slowik, having failed in his first threat, then decided to retaliate against respondent with a campaign of additional threats, touching, and smarmy remarks, this would be a retaliation case. On the other hand, if the particular sexual contact that Slowik was after all along was groping and whatever pleasure he took from subjecting respondent to sexual remarks, then this would be a submission case. Surely the presence or absence of a Title VII violation should not turn in this way on the mentality and sexual tastes of the harassing supervisor.

III.

AN ABUSE OF OFFICIAL POWER CONSTITUTES EMPLOYER ACTION REGARDLESS OF WHETHER THE THREATENED OR REALIZED HARM IS "TANGIBLE".

Petitioner argues in the alternative that a supervisor's discriminatory use of his official power does not constitute an action by the employer (and thus is not in and of itself illegal under Title VII) unless that action has (or if taken would have had) a "tangible" effect on the victim's terms and conditions of employment. The evident purpose of this argument is to create a legal distinction between injuries which are "tangible" and those which are not, establishing for the latter a different, more stringent set of liability rules. According to petitioner, the use of official power to harass, retaliate against, or otherwise discriminate against a subordinate

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(Cont'd)
in a manner as to lead the victim under the circumstances reasonably to believe it to be a dangerous weapon

or "the accused caused bodily harm to the victim." ILCS 5/12-14(1) and (2).

would be the act of the employer if, but only if, the injuries that resulted were "tangible".

The nature of the distinction which petitioner proposes is quite unclear. Petitioner offers no standard for distinguishing injuries that are "tangible" from those that are not. Petitioner repeatedly indicates that an injury must be "economic" to be tangible (P.Br. 16 n. 11, 17 n. 13, 33, 34), but elsewhere disavows any such restriction. (P.Br. 28 n. 19.) Some portions of petitioner's argument seem to insist on a formal directive altering a victim's job parameters (P.Br. 14), while others require only that there be "adverse job consequences." (P.Br. 13, 32.) Petitioner at one juncture suggests that injuries caused by threats could never be tangible (P.Br. 17 n.14), but it is unclear how petitioner would treat a threat so serious that it led the victim to resign, e.g. a threat to fire the subordinate on a false charge of theft if she did not immediately provide sexual favors.

Mixed in with petitioner's proposed "tangible" requirement is a second, quite different proposal by Chief Judge Posner, that the discriminatory use of official power must be a "company act." (P.Br. 17 n. 14, 21, 23.) This doctrine seems to relate, not to the magnitude of the injury, but to whether the invidiously motivated action was formalized in some way that would be "subject to . . . review by higher-ups in the company." (Pet. App. 49a.) Thus, apparently, a supervisor's action formally reducing a worker's pay by one cent an hour would be a company act and thus illegal under Title VII, but the same supervisor's harassment of the worker in a way that interfered with her job performance, or even direct interference with her work — denying supplies, refusing to provide information or to fill orders — would not be a company act, even though it might cost the victim thousands of dollars. The lower court opinion which petitioner cites for the "company act" doctrine evidently understands it to apply only to major actions, such as dismissals and demotions (Pet. App. 49a); petitioner, on the other hand, asserts that such things as changes in a job title, exclusion from work on a committee, or an adverse performance review would all constitute "tangible" alterations in a victim's employment.

(P.Br. 12, 17 n. 13, 22.) Conversely, although Chief Judge Posner would treat constructive discharge as a "company act" (Pet. App. 54a-55a), petitioner necessarily takes a different view, since the instant case involves just such a constructive dismissal claim. (Pet. App. 286a-287a.)

These vague and conflicting proposed restrictions on the scope of Title VII have no evident basis in either Title VII or the principles of agency law. The suggestion that sexual harassment or other discriminatory acts should be treated less seriously under Title VII if the injuries they cause are not "tangible" was expressly considered and rejected in *Meritor*, which refused to read into Title VII that very term. 477 U.S. at 64.[41] The central purpose of Congress when it amended Title VII in 1991 to permit awards of compensatory damages was to provide redress for *non*-economic injuries that were often caused by Title VII violations but which fell outside the scope of equitable back pay awards.[42] Petitioner urges this Court to read back into Title VII precisely the distinction that this Court rejected in 1986 in *Meritor* and that Congress repudiated in 1991.

Title VII establishes a number of distinct elements to a discrimination claim, including whether the discrimination was

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41.

> Petitioner ... contends ... that in prohibiting discrimination ... Congress was concerned with what petitioner describes as "*tangible* loss" of "an economic character," not "purely psychological aspects of the workplace environment." ... We reject petitioner's view.... [T]he language of Title VII is not limited to "economic" or "*tangible*" discrimination. The phrase "terms, conditions, or privileges of employment" evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women' in employment.

(Emphasis added.)

42. H.R. Rep. No. 102-40(I) 64-69 (1991); H.R. Rep. No. 102-40(II) 24-25 (1991).

the act of an "employer", and whether the discriminatory act was serious enough to alter the terms or conditions of the victim's employment. Petitioner's tangible company act theory conflates these two separate elements, resulting in an ill-defined doctrine under which the issue of whether an action is the act of an employer apparently depends on the magnitude or type of injury caused. By recognizing a category of discriminatory abuse of official power for which an employer will not ordinarily be liable, the doctrine provides an incentive for discriminatory supervisors coyly to adjust the misuse of their powers to cause or threaten only non-"tangible" discriminatory injuries, even though those threats or injuries may in practice be entirely sufficient to extort sexual favors or to drive a victim to resign.

There is no empirical basis, and little logic, to support petitioner's contention that an employer is better able to prevent discrimination which is "tangible." If a supervisor announces to a subordinate that he will fire her unless she performs a sexual act, the victim *knows* that harassment has occurred, and there is an eyewitness — the victim herself. But if the same supervisor refuses to hire a job applicant because she is a woman, the victim often will have no idea whether discrimination may have occurred, usually being unaware even of the identity or credentials of the successful applicant, and there will ordinarily be no eyewitness with direct evidence of a discriminatory motive. The ease with which a company president could detect discriminatory practices would probably have more to do with the size of the company, and with whether the practices were systemic or isolated, than with the type of discrimination occurring. In any event, federal judges certainly lack the breadth of managerial experience necessary to determine whether petitioner's fact-bound contention, or the opposite view, is correct.

IV.

THE ADOPTION OF AN ANTI-HARASSMENT POLICY IS NOT A PER SE DEFENSE TO A TITLE VII SEXUAL HARASSMENT CLAIM.

(a) Petitioner insists that, regardless of whether respondent was in fact afraid that Slowik or others would retaliate against her if she resisted or complained, that fear was not "reasonable" because respondent had a policy against sexual harassment. (P.Br. 20, 29.) We agree that proof of a threat-based use of authority requires a showing both that the victim was afraid and that that fear was reasonable. Evidence that a defendant had an anti-harassment policy could properly be considered by a trier of fact in determining the reasonableness of such fears, but that one circumstance would assuredly not be dispositive, since there is a wide variety of other facts that would be equally probative. Under the circumstances of this case, petitioner has fallen far short of the showing required by Rule 56(c) that there was no "genuine issue" regarding whether it would have been reasonable for respondent to fear retaliation.

Petitioner's contention cannot appropriately be raised at this juncture in the litigation. The reasonableness of respondent's fear of reprisals is necessarily a factual question. In its summary judgement motion, however, petitioner never asserted that there was no genuine issue on this matter; indeed, petitioner did not refer at all to the reasonableness of respondent's apprehensions. This issue cannot fairly be said to be encompassed within the question presented.

The anti-harassment policy on which petitioner relies consists of one sentence: "[T]he company will not tolerate any form of sexual harassment in the workplace."[43] Petitioner relies exclusively on the existence of this single statement; it put in the record no evidence of steps that it had taken to implement the statement, of training of supervisors, of meetings with possibly vulnerable

43. Doc. 14, Ex. F, p. 3.

subordinates, or of disclosure of actions taken internally to deal with past problems. Petitioner does not claim, or at least proffered no evidence, that it had safeguards in place to protect complainants from reprisal, nor does it explain the procedure that would be followed in investigating a complaint. It is unlikely that an employer of the size of petitioner would never have received a sexual harassment complaint, but petitioner offered no evidence regarding how it had dealt with past problems, let alone regarding how respondent might have been aware of petitioner's past record[44].

The existence of a policy against sexual harassment obviously does not guarantee that no such harassment will occur; in the instant case respondent offered detailed testimony that Slowik did in fact engage in a campaign of harassment that violated that very policy. Similarly, the mere existence of that same policy does not guarantee that neither her harasser nor others would be able to engage in retaliatory action or to continue that harassment following the filing of a complaint. An anti-harassment policy, unlike the seniority provisions in a collective bargaining agreement, is not a mechanical rule certain to be implemented once invoked. Petitioner does not assert that its officials will always root out, with complete good faith and unerring accuracy, any harassment about which a complaint is received; it seeks an "opportunity" to do so, but does not and could not guarantee that its supervisors will utilize that opportunity.

A complaint about harassment or retaliation may for several reasons be unavailing despite the existence of a formal anti-harassment policy. It is virtually certain that an accused harasser will emphatically deny the allegations; if the critical evidence is of the "he said, she said" variety, the responsible officials may err in their assessment of that evidence or may simply be unsure of what occurred. If the company, in perfectly good faith, erroneously concludes that no harassment has occurred, the harasser may even

44. In her opposition to petitioner's motion for summary judgment, respondent stated regarding the sexual harassment policy, "I was not aware of whether it was being enforced." (Pet. App. 272a.)

be emboldened, leaving the victim considerably worse off than if she had never complained at all. The company's assessment of the facts may be colored if the alleged perpetrator is of longer tenure, and thus better known, or simply more valuable to the employer. The decisionmaking official may also be swayed by personal favoritism, a disagreement with the firm's policy, an unduly narrow view of what constitutes harassment, or concern that a finding of harassment may lead to excessive sanctions against the perpetrator or might open the employer to legal liability.

Respondent did not simply rely on these general but very real risks. She adduced evidence that the alleged harasser had been with the company since 1965, and held the position of vice president; petitioner, who was the target of harassment before she was ever hired and who survived on the job only fourteen months, could reasonably assume that Slowik's actions reflected his well informed understanding regarding the unlikelihood that petitioner would actually enforce against him the policy in question[45]. Slowik made several of the remarks in question in front of Vice President Brenna; it was only prudent for respondent to infer from this that Slowik was confident that Brenna, despite the nominal policy in question, would take no action, as indeed he did not. Respondent complained to one of the company supervisors, Donna Thibideau, and several other Burlington employees, all of whom had more years of experience at the firm than she did. So far as appears from the record, none of them assured her that Slowik could never get away with retaliation, or that a complaint was likely to be both successful and reprisal free. Petitioner suggests that it would have been appropriate and effective for respondent to complain to Patrick Lawrence, who was Slowik's subordinate; in *Faragher v. City of Boca Raton*, No. 97-282, however, the defendant has taken precisely the opposite position, insisting that a harassment victim

45. Slowik was asked at his deposition whether he was aware of any employee ever having been disciplined by petitioner for sexual harassment. That question and his answer, however, were not put in the record by either party.

should realize that a complaint to the subordinate of the perpetrator would obviously be pointless.[46]

The difficulty faced by a harassment victim trying to assess whether to file an internal complaint is complicated by the fact that her prospects turn, not only on the contours and reality of a company's policies, but also on her specific circumstances. The temperament of a given perpetrator may color the seriousness of his threats, and his power and influence in the firm may affect his own supervisors' likely response. An at-will or newly hired worker will usually be at greater risk than a long-time employee with seniority rights and the assistance of an aggressive union. The degree to which the harasser in question actually controls his victim's employment, both his ability to dismiss her and his capacity to make her life miserable, will vary from case to case. A supervisor who is an accomplished liar may be more of a threat than a bumbling bully.

(b) In the alternative, petitioner and one of its amici[47] urge this Court to adopt a per se rule requiring dismissal of at least certain sexual harassment cases if a plaintiff has failed to utilize an employer's internal complaint process. (P.Br. 13, 20.) Neither, of course, suggests that the Court should adopt such a rule for any other type of Title VII violation, such as discrimination in hiring or wages or racial discrimination.

The threshold problem posed by this proposed rule is that it would require the courts to decide precisely which employer-created plans are to be given such an extraordinary preclusive effect. Petitioner itself simply does not address this issue. The EEAC describes the internal procedures which a harassment victim must, at her peril, invoke, as company processes which are "adequate" (EEAC Br. 7, 17), "good" (*id.* at 22), "accessible" (*id.* at 18), "effective" (*id.* at 20, 22), "aggressive" (*id.* at 23), "the finest" (*id.*) and "the most conscientious." (*Id.*) Fashioning such a standard

46. Brief for Respondent, p. 45.

47. Brief Amicus Curiae of the Equal Employment Advisory Committee, pp. 17-23.

would require the courts to establish requirements about the terms of a written policy, the type and frequency of training, meetings, warnings and notices, whether an employer should publicize disciplinary actions, measures to assure privacy and prevent reprisals, standards of proof, and levels of sanctions. The necessary elements of a plan would obviously vary from employer to employer; the level of specificity, type and formality of process that a court might deem sufficient for employees of the National Organization for Women could well be palpably inadequate at the Aberdeen Proving Ground.

The policy argument underlying petitioner's contention--that employers should be accorded an opportunity to resolve discrimination problems less formally before they are sued--was to some degree accepted by Congress, but the statutory scheme fashioned by Title VII to address these concerns is entirely different than what petitioner proposes. Under Title VII a discrimination victim is already required to pursue less formal mechanisms before bringing suit. Under section 717(c) federal employees must file a complaint with their agency; state, local and private employees are required by section 706 to file charges with either the EEOC or certain state agencies certified for that purpose by the EEOC. The congressional decision to permit all but federal employees to take their complaints to an outside agency reflects Congress's understandable concerns about retaliation against complainants. Section 704 forbids in sweeping terms any form of discrimination against "any individual . . . because he has opposed any practice made an unlawful employment practice by the Title". In addition, section 706(b) authorizes members of the EEOC itself to file commissioner's charges, a process designed for situations in which Congress anticipated that all of the individual discrimination victims would be legitimately afraid to file their own complaints.

This system created by Congress differs in important respects from the scheme proposed by petitioner. First, Congress quite deliberately provided that only one group of employees — those who work for the federal government — would be required to file their complaints with their own employer; the forum provided for

all other employees was the EEOC or an independent state agency. Petitioner would allow any private employer in the nation to assume the special role that Congress saw fit to accord only to federal agencies. Under section 706 respondent was required to, and did, file an administrative complaint with the Illinois Department of Human Rights; nothing in Title VII authorizes the courts or petitioner to create an additional requirement that respondent also file with the Burlington Industries Department of Human Resources. Second, Title VII establishes specific procedures and substantive standards which must be followed by the EEOC or federal or state agencies in processing complaints. The EEOC in turn has promulgated stringent regulations which a state agency must meet before complainants are required to file charges with them, 29 C.F.R. §§ 1601.70-1601.79, and carefully evaluates at least once every three years the quality of each state agency's work. 29 C.F.R. § 1601.78(a). None of these safeguards would apply to an employer's own homegrown complaint process.

The specific proposal now advanced by petitioner regarding sexual harassment was expressly rejected by Congress in 1991. Both the House Judiciary Committee[48] and the full House[49] considered and rejected proposed language, sponsored by Minority Leader Michel and the Bush administration, which would have required sexual harassment victims to utilize employer internal complaint procedures[50]. In the absence of such a complaint, under

48. H.R. Rep. No. 102-40(I) 103 (1991). The committee explained it had rejected this proposal because "[s]uch a rule would in effect punish the *victim*, particularly given testimony the Committee received . . . that . . . '[v]ictims perceive that to come forward within their workplaces is to be labeled as "troublemakers" or "oversensitive." ' " *Id.* (Emphasis in original.)

49. 137 Cong. Rec. H3908 (daily ed. June 4, 1991).

50. The Michel proposal would have amended section 703(a) of Title VII, defining unlawful employment practices, by adding a new subsection (3) declaring it unlawful

> to harass any employee or applicant for employment

(Cont'd)

the Michel proposal, there would have been no violation of Title VII. Representative Michel offered in support of this proposal arguments similar to those now advanced by petitioner.[51] In successfully opposing this proposal, Representative Mink argued that it would be wrong to impose additional obstacles on sexual harassment victims, who already "take an enormous amount of courage before they step forward."[52]

Petitioner urges that employers will have no incentive to establish anti-discrimination policies and procedures if the creation of those measures is not rewarded with complete immunity from suit. (P.Br. 23.) But as even the Chamber of Commerce acknowledges, regardless of whether immunity is obtained, such procedures will if effective serve two compelling employer interests — by actually preventing sexual harassment these procedures both

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> because of that individual's race, color, religion, sex, or national origin. *Provided, however,* That no such unlawful employment practice shall be found to have occurred if the complaining party failed to avail himself or herself of a procedure, of which the complaining party was or should have been aware, established by the employer for resolving complaints of harassment in an effective fashion within a period not exceeding ninety days.

137 Cong. Rec. H3897 (daily ed., June 4, 1991) (bound in the daily edition volume for June 5, 1991). (emphasis in original.)

51. Representative Michel explained that this proposal, by barring lawsuits by harassment victims who had failed to utilize an employer's complaint process, would "encourage employers to adopt meaningful complaint procedures" and would "encourage employees to use them. The employer will not be found liable if the complaining party failed to avail himself or herself of an effective complaint procedure." 137 Cong. Rec. H1666 (daily ed., March 12, 1991).

52. 137 Cong. Rec. H3904 (daily ed. June 4, 1991) (this passage is bound in the daily edition of June 5, 1991); *see id.* at H3850 (remarks of Rep. Kennelly) ("the language in the Michel substitute stacks the deck in favor of the harasser.")

minimize litigation and avoid the harms to employee morale and productivity that harassment can bring about.[53] This Court noted in *Landgraf v. USI Film Prods.*, 511 U.S. 244, 283 n. 35 (1994), that "[t]he new damages provision . . . can be expected to give managers an added incentive to take preventative measures to ward off discriminatory conduct by subordinates *before* it occurs." (Emphasis in original.) The House Committee which rejected the Bush administration exhaustion proposal believed that the resulting bill was best calculated to provide incentives to employers to end harassment.[54] Title VII has never afforded employers this species of immunity regarding forms of discrimination other than sexual harassment, and petitioner does not suggest that that lack of immunity has somehow diminished employer efforts to eradicate such other discriminatory practices. Practical experience demonstrates that the lack of immunity spurs, rather than deters, preventative measures. Employers are strictly liable if company drivers speed or drive drunk while on company business, yet they do not for that reason take less seriously the need to prevent such misbehavior.

This proposal, moreover, cannot be reconciled with the fact that a supervisor will in practice be able to exploit his authority to harass a subordinate so long as the subordinate reasonably fears retaliation for resistance, non-compliance, or complaint. A company policy and procedure that might seem generally sufficient could well be inadequate in particular instances to alleviate reasonable fears about specific supervisors (e.g. the boss's son) or on the part of particular workers. Title VII does not guarantee that in every situation, or at every worksite, it will actually be possible to alleviate reasonable fears. Although the United States armed forces have been making serious efforts to deal with sexual harassment, it is likely that many women in the military today would quite reasonably be wary of complaining about sexual harassment; we set out in the appendix to this brief a recent report regarding the

53. Brief Amicus Curiae of the Chamber of Commerce of the United States of America, p. 17.

54. H.R. Rep. No. 102-40(I) 65, 69-70 (1991).

professionally disastrous consequences that have befallen the complainants in the case of Sergeant Major Gene McKinney.

(c) Petitioner and its amici exhibit a certain obliviousness to the complex plight of a victim of sexual harassment by a supervisor. Their briefs proceed on the implicit assumption that filing a sexual harassment complaint against one's boss is like returning a defective toaster to K-Mart, an action which is virtually certain to succeed and which cannot conceivably lead to reprisals. In the real world, however, a complainant would be foolhardy to heed only the words of a paper policy, ignoring the corporate culture and personalities involved[55]. Retaliation against sexual harassment complainants is a widespread problem.[56] An employee who files a sexual harassment complaint against her supervisor is necessarily gambling her job, if not her entire career, on the outcome and collateral consequences of that process.

A harassment victim who files an internal complaint risks a wide array of negative consequences. Any subordinate's complaint about his or her boss is fraught with peril; a complaint of sexual

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55. Giving a public speech denouncing the city mayor as incompetent and corrupt would assuredly be safe, and possibly efficacious, in Pekin, Illinois, but that same course of action remains fraught with peril in Beijing, China, even though written guarantees of free speech exist in both jurisdictions. Constitution of the People's Republic of China (1982), Art. 35 ("Citizens of the People's Republic of China enjoy freedom of speech, of the press, of assembly, of association, of procession and of demonstration"), in Albert P. Blaustein and Gisbert H. Flanz, eds., *Constitutions of the Countries of the World*, v. iv (1991).

56. *E.g. Saulpaugh v. Monroe Community Hospital*, 4 F.3d 134 (2d Cir. 1993); *Lipsett v. University of Puerto Rico*, 864 F.2d 881 (1st Cir. 1988); *Rufo v. Metropolitan Life Ins. Co.*, 1997 U.S. Dist. LEXIS 18011 (E.D. Pa. Nov. 4, 1997); *Davis v. Palmer Dodge West, Inc.*, 1997 U.S. Dist. LEXIS 14191 (S.D. Ind. Sept. 2, 1997); *Shipbaugh v. Boys & Girls Club of Am.*, 883 F. Supp. 295 (N.D. Ill. 1995); *Henry v. Gehl Corp.*, 867 F. Supp. 960 (D. Kan. 1994); *EEOC v. Metzger*, 824 F. Supp. 1 (D. D.C. 1993); *Mead v. Fidelity & Guaranty Co.*, 442 F. Supp. 114 (D. Minn. 1977).

harassment is particularly explosive and often difficult to prove. Such a complaint will assuredly destroy the victim's professional relationship with the harasser, who may well have been one of her mentors. The harasser himself may retaliate against a complainant for having filed a complaint; even if the harasser does not, indeed, even if (or perhaps because) the harasser is punished, other employees may retaliate. The complainant may find her motives, her professionalism or her sexual history savaged by the harasser or his partisans. If the underlying complaint is unsuccessful, the complainant may find herself branded a liar, and the perpetrator, or others, may be emboldened by the failure of the complaint. A worker who files complaints of this sort runs a risk of being branded as a troublemaker. Given these dangers, all too often the most prudent course for a harassment victim is to try to ignore the problem, or, if it persists, quietly to look for another job. A job applicant who simply resigned from her last position often will have better employment prospects than a worker who was fired in retaliation for having filed a complaint.[57]

To a harassment victim trying to decide whether to complain about a harassing supervisor, the overriding consideration will be the magnitude of the professional and economic risks she would be taking and the egregiousness of the harassment. The best way for an employer to elicit such complaints is aggressively to reassure victims that complaints will not lead to even greater problems, and will have a reasonable chance of bringing about an end to the abuse. An employer's threat that non-complainants will forfeit their Title VII rights will do little to encourage such complaints. The first priority of discrimination victims is not lawsuits but continued employment; workers who live from paycheck to paycheck need their jobs to pay the rent and feed their families. *See Ford Motor*

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57. Judge Posner noted that an harassment victim who complains and is dismissed in reprisal would be worse off than a victim who quietly resigned if the complainant wanted a job reference for future employment. (Pet. App. 58a). Except for harassment victims on the verge of retirement, *all* victims are likely to need such favorable job references.

Co. v. EEOC, 458 U.S. 219, 221 (1982). Few employees would be so brave, if not foolhardy, as to imperil those immediate needs simply to preserve the uncertain possibility of a Title VII lawsuit. Most harassment victims never sue, few can find attorneys who will represent them without a substantial retainer, and civil litigation is both unpredictable and slow; the discrimination at issue in *Meritor* and *Harris* had occurred six to twelve years before those cases reached this Court. Where reasonable fear has deterred a harassment victim from complaining about severe or pervasive abuse, an interpretation of Title VII barring her on that account from suing for damages or back pay would simply add injury to insult.

Where a supervisor trades on fear of his official powers to engage in sexual harassment, an implicit threat of retaliation for any complaint will normally be present. If that threat succeeds in deterring the filing of a complaint with an employer, petitioner proposes to sanction, not the harasser, but the victim. This is rather like punishing the parents of a kidnapping victim for failing to go to the police. The effect of the sanction proposed by petitioner, in this and any other case, would be to bar judicial inquiry into the merits of the harassment complaint, thus preventing discovery which might reveal the harasser's culpability. Thus petitioner's proposed rule operates to abet the harasser's abuse of authority; a harasser who succeeds in deterring his victim from filing an internal complaint will also be assured that the victim can never sue under Title VII. This would be a singularly perverse interpretation of Title VII.

V.

THIS CASE PRESENTS GENUINE ISSUES OF MATERIAL FACT REGARDING WHETHER A VIOLATION OF TITLE VII OCCURRED.

Petitioner does not deny that respondent could reasonably have understood Slowik's various remarks as threatening retaliation if she did not do as he wished. The district court concluded that

> a reasonable jury could find that Slowik's conduct . . . could be regarded as reinforcing Slowik's previous persistent implicit messages to [respondent] that . . . her growth in the company was dependent upon her sexual availability to him.

(Pet. App. 263a; *see id.* at 263a-264a.)

A reasonable jury could surely conclude that Slowik's actions were facilitated by his position of authority over respondent. As the district court correctly observed,

> Slowik certainly invoked his apparent authority when he asserted that he could make Ellerth's life at Burlington very easy or very hard, and it was precisely the existence of the agency relationship that permitted Slowik the opportunity to exploit his position of authority and harass Ellerth.

(Pet. App. 277a.) It is obvious that if Slowik had been the Merchandising Assistant, and respondent had been the Vice President for Sales and Marketing, Slowik would not have dared to touch respondent's buttocks, to comment on the size of her breasts, to ask if she was "practicing" to have a family, or to refuse to respond to inquiries from his boss until she described what she was wearing.

Petitioner does not dispute the district court's conclusions that a reasonable jury could conclude that the harassment facilitated by abuse of Slowik's position was sufficiently severe and pervasive to alter the terms and conditions of respondent's employment. (Pet. App. 264a-266a.) At this preliminary stage of the litigation it is necessarily unclear whether the case involves reprisals by Slowik, submission by respondent, or both. Slowik certainly made good on his threat to make respondent's work difficult. Respondent's Title VII charge squarely alleged that the harassment leading to her constructive discharge was in reprisal for her opposition to sexual harassment. If Slowik's particular sexual desire was in part to be able, without vehement objection, to touch respondent on the buttocks, or to engage in lewd remarks, this would also be a

submission case.[58] Slowik assuredly wanted respondent to refrain from complaining about his actions and remarks; petitioner acknowledges that respondent acceded to this demand, indeed objects that she did so, blaming in this case the victim rather than the perpetrator.

CONCLUSION

Accordingly, respondent respectfully requests that the *en banc* decision of the United States Court of Appeals for the Seventh Circuit on the issue presented be affirmed.

Respectfully submitted,

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58. That some individuals find sexual stimulation short of intercourse to be desirable is demonstrated, for example, by the popularity of magazines such as Playboy and the proliferation of telephone sex lines.

APPENDIX

BEST AVAILABLE COPY

APPENDIX A — NATIONAL PUBLIC RADIO REPORT DATED MARCH 17, 1998

NATIONAL PUBLIC RADIO, MORNING EDITION, MARCH 17, 1998

Aftermath of McKinney Trial

* * *

BOB EDWARDS, HOST: This is MORNING EDITION. I'm Bob Edwards.

Army Command Sergeant Major Gene McKinney is to be reprimanded and demoted in rank. That was the verdict yesterday of a military jury which last week acquitted him of all charges of sexual misconduct. McKinney was convicted on one charge of attempting to obstruct the investigation.

With the criminal trial now over, McKinney has begun a civil action against one of his accusers.

NPR's Barbara Bradley reports from Fort Belvoir, Virginia.

BARBARA BRADLEY, NPR REPORTER: For the first time in six weeks, Gene McKinney left the courtroom knowing his future. He will retire honorably after a stellar career, but with a federal criminal conviction on his record. He will not have to go to jail, but will suffer financially since his demotion to master sergeant, two ranks below the one he held at the pinnacle of his career, will result in a much smaller pension.

As he left the courthouse, he told CNN he was relieved it was over.

Appendix A

ARMY COMMAND SERGEANT MAJOR GENE MCKINNEY: We're gonna move on with our lives in spite of this long, extensive investigation. And we did OK.

BRADLEY: He certainly did, considering the possibilities. After six women accused McKinney of sexual misconduct, ranging from assault to adultery, he faced 55 years in jail and a dishonorable discharge. So, when the jury cleared him of all but one of the 19 charges on Friday, his prospects brightened dramatically. That lone conviction, obstruction of justice, puzzled many people, but not McKinney's Army lawyer, Lieutenant Colonel James Gerstenlauer.

ARMY LIEUTENANT COLONEL JAMES GERSTENLAUER, ARMY LAWYER FOR GENE MCKINNEY: The system worked. Everybody had their day in court. They got to tell their story. He got to tell his. This was not a kangaroo court. This was not a rubber stamp. This was military justice at its best.

BRADLEY: His accusers don't quite see it that way. But McKinney's chief accuser, Staff Sergeant Christina Fetrow (ph), notes that McKinney leaves with his honor tarred and his retirement pay reduced. McKinney will lose more than a quarter of his retirement pay from what he would have received as Sergeant Major of the Army, although McKinney's attorneys will appeal so that he can receive the full amount.

Still, Fetrow says she takes some solace in the punishment, since she expected the jury to give him none at all.

ARMY STAFF SERGEANT CHRISTINA FETROW: He did get demoted. He is Sergeant McKinney now. He is a convicted felon. So, all those put together, I could say I'm satisfied.

Appendix A

BRADLEY: But Fetrow and the other five women say the end of the trial is hardly the end of their ordeal. Each of their lives has been fundamentally changed by what they still claim McKinney did to them and by the ensuring investigation.

Fetrow says after she began cooperating with the government, she received death threats and she had to enter a witness protection program. Her friends distanced themselves from her, afraid to hurt their careers. She tells of living out of a suitcase and spending Christmas alone because she didn't want to endanger her family.

FETROW: I've felt threatened. I've felt isolated, alone. I've just felt like I was doing the right thing, but I would constantly ask myself, at what cost and for what?

BRADLEY: And like Fetrow, Sergeant Christine Roy (ph) says if she had known what was ahead, she might never have come forward with her allegations.

Many observers say Roy's story was the most credible. Certainly it was the most explicit. Roy says McKinney forced her to have sex with him in October 1996, when she was seven-and-a-half months pregnant.

Though the defense did not introduce evidence that Roy was a liar and a fraud, as it did with Fetrow and the other women, it did suggest she made her allegations out of spite — she was upset that McKinney didn't offer her a job. Roy says after the past year, any naivete she once had is gone.

ROY: Now, I don't care. I don't care what you think of me. I don't care what I say to you. I don't care if I talk to you. It's just

— it's changed my personality completely. Sergeant Major McKinney took my personality, used it, abused it, and threw it away.

BRADLEY: Army personnel say it was an eight-member jury and not the policymakers at the Pentagon that delivered the McKinney decision. Yesterday, Army Chief of Staff Dennis Reimer reiterated that the service has zero tolerance for sexual harassment and will continue to prosecute those cases vigorously. He added that McKinney's accusers should remember that as they return to their bases and pick up their lives.

GENERAL DENNIS REIMER, ARMY CHIEF OF STAFF: And we will work with them to assure that we do protect their privacy and protect their careers and work with them in terms of what they want to do in the future.

NAVY PETTY OFFICER JOHNNA VINSON: I respect General Reimer. However, I think that statement is naive.

BRADLEY: Navy Petty Officer Johnna Vinson, who also accused McKinney of propositioning her for sex.

VINSON: I don't think he will be able to protect those women. I don't need protection from the Army. However, those couple of people who are still on active service in the Army do need protection and they will not be able to get it.

BRADLEY: In fact, of the three active servicewomen NPR interviewed, all said they are going to leave the military. Fetrow says she's branded as a liar and a fraud, not exactly the credentials for career promotion. Christine Roy also says she's leaving. She believes she'd never make it past the rank of sergeant.

ROY: Unfortunately, my career is over. I don't have the energy to continue this battle in this military as it stands. But if I did, I believe I wouldn't even be able to. I'm no longer competitive for promotion. I would be blackballed. And I think it would be very difficult and very trying, and, quite frankly, I don't have the energy for it.

BRADLEY: Even for the woman who has left the military, the McKinney trial will resonate for some time. Brenda Hoster was the first to come forward with her allegations, allegations that McKinney had asked her for sex while they were attending a conference in Hawaii in April, 1996. Last February, after McKinney was appointed to a panel investigating sexual harassment in the Army, Hoster went to The New York Times with her story and later to network television.

Now that move, which ultimately resulted in the year-long investigation, has made Hoster the target of a lawsuit herself. The Sergeant Major of the Army is suing Hoster for [libel] and seeking $1.5 million in compensatory and punitive damages.

McKinney's civilian lawyer, Charles Gittens, was asked why McKinney would prolong the ordeal with a civil suit.

CHARLES GITTENS, CIVILIAN ATTORNEY FOR GENE MCKINNEY: Because you don't get to lie on national TV about people. That's why. You don't get to be personally aggrandized on somebody's else's back, as Brenda Hoster did. You don't get to make false allegations on national TV. Brenda Hoster needs to learn that lesson and we intend to — we intend to give it to her.

BRADLEY: McKinney cannot sue the other five women who remain in the military. Under the so-called Ferris (ph) Doctrine, no one in the military can sue a superior or a subordinate.

As for Hoster, she's confident that the very high legal standards to prove [libel] will protect her, and several lawyers agree.

But Hoster says she has another concern, one echoed by the five other accusers. She says that the Army threw money, people, and resources into prosecuting McKinney, but the case failed. So, what woman would want to come forward now?

ARMY SERGEANT MAJOR BRENDA HOSTER (RET.): I think it's gonna take a long, long time for women to want to trust the system after they see — they have seen what we've been through. Who would want to do this, knowingly do this? So, I think that what that does is that just opens it up. It's open season once again on the women.

BRADLEY: For now, Hoster will return to El Paso, where she has a personal service business, running errands and cleaning houses. And both she and McKinney will be busy preparing to meet again — the next time in the district court of Washington, DC.

* * *

Supreme Court, U.S.
FILED
APR 13 1998
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No. 97-569

In the Supreme Court of the United States
OCTOBER TERM, 1997

BURLINGTON INDUSTRIES, INC.,
Petitioner,

v.

KIMBERLY B. ELLERTH,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONER BURLINGTON INDUSTRIES, INC.

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STATEMENT OF FACTS

A complete statement of the facts in the record is contained in Petitioner's Brief. Nevertheless, Burlington is compelled to supplement that statement due to the serious mischaracterizations of the record contained in the briefs of Respondent, Kimberly Ellerth, and her *amici*.

First, Ellerth incorrectly states in her brief that she reported the alleged harassment of her supervisor, Ted Slowik, to Burlington management, stating: "During her fourteen months at Burlington, Ellerth complained about Slowik's sexual harassment to a number of managerial and non-managerial employees." Resp. Br.[1] 5. This statement contradicts Ellerth's sworn testimony in this case, in which she unequivocally stated that despite her knowledge of Burlington's policy against sexual harassment, which provides three avenues for complaint, she never reported Slowik's alleged conduct to anyone in authority. Her representations to the contrary are a gross distortion of the record.

Specifically, Ellerth testified as follows:

Q. . . . In any event, you chose not to do that, correct?

A. Chose not to do what?

Q. To report the conduct of Ted Slowik.

A. Correct.

Q. To anyone in authority.

A. Correct.

* * *

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[1] Citations to "Resp. Br" shall refer to the Brief for Respondent.

Q. You never told anyone in human resources about it, did you?

A. No, I did not.

J.A. 112-13. Ellerth also testified that she did not inform her direct supervisor of the alleged harassment because, as she testified at deposition, "it would be his duty as my supervisor to report any incidents of sexual harassment." J.A. 110-11. Moreover, Ellerth testified that none of the Burlington employees whom she allegedly told of Slowik's harassment were her supervisors or in authority at the company. J.A. 104-09.

Second, Ellerth and several of her *amici* state or imply that Ellerth was constructively discharged as a result of her failure to "submit" to Slowik's alleged harassment. Resp. Br. 4-5, 7, 11.[2] Ellerth ignores the record below and the reasons which she herself gave for her resignation at the time. On the day she quit, Ellerth faxed a letter to her supervisor reciting a litany of reasons for her resignation, including a lack of proper training, lack of support from Ellerth's co-workers, her supervisor's failure to provide positive feedback, "nit picking" and "whining" customers and a "standing offer from a well-known company." J.A. 10-14.[3]

Based on this and other evidence in the record, including Ellerth's failure to report the alleged harassment, the district

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[2] *See also* Brief *Amicus Curiae* of the National Employment Lawyers Association in Support of Respondent at 7 ("[Respondent] was constructively discharged, [and] her promotion was delayed").

[3] Ellerth claims that she and her husband deleted brief references to Slowik's alleged conduct from this letter before sending it to her supervisor and concedes that her supervisor never saw these redacted passages. J.A. 100-03.

court concluded, "Ellerth consciously chose not to use Burlington's grievance procedure; therefore it cannot be said that Burlington made Ellerth's working conditions intolerable forcing her into an involuntary resignation. Plainly, when an employer provides an avenue for relief from sexual harassment and an employee chooses to forego that avenue, she cannot be heard to complain that she was constructively discharged by virtue of the harassment." Pet. App. 286a. This ruling was not disturbed by the Seventh Circuit on appeal. Thus, it is the law of this case that Ellerth was *not* constructively discharged as a result of Slowik's alleged conduct. *See Williamsburg Wax Museum, Inc. v. Historic Figures, Inc.*, 810 F.2d 243, 250 (D.C. Cir. 1987).

Third, Ellerth's allegation, which was formalized in a chart, that Slowik committed 139 separate acts of sexual harassment is insupportable. J.A. 162-73. For instance, Ellerth claims that at a lunch in the summer of 1993, Slowik made "about" 20 off-color jokes, none of which she can specifically remember. J.A. 23-27. This accounts for 20 of Ellerth's 139 acts of harassment. J.A. 164. As the district court observed, "the chart must be taken with a very large grain of salt" for this very reason. Pet. App. 261a, n.8.

Fourth, Ellerth claims that a genuine issue of fact exists because Burlington did not offer evidence below regarding, *inter alia*, how it investigates sexual harassment complaints, how it had remediated past harassment allegations or what "safeguards" were in place to protect Ellerth from reprisal. Resp. Br. 32-33. This argument is absurd. There is no dispute that Burlington had a sexual harassment policy in place. J.A. 113. Ellerth presented no evidence at the summary judgment stage that Burlington did not enforce this policy or that Burlington ever retaliated against any employee who reported sexual harassment. Burlington had no

obligation to present evidence of facts which were undisputed at the summary judgment stage.[4]

Finally, Ellerth has mischaracterized the district court's ruling that it could consider alleged harassment occurring prior to December 20, 1993. Resp. Br. 3 n.4. The district court in fact held that these alleged acts, including Slowik's alleged statement to Ellerth that he could make her life "very hard or very easy" and numerous other acts, were time-barred and could not form the basis of Ellerth's claims. Pet. App. 261a. The portion of the district court's opinion cited by Ellerth only refers to the issue of whether Slowik's time-barred conduct could be considered in determining whether the conduct was sufficiently "severe and pervasive" to constitute a hostile work environment, which is no longer at issue in this case. Pet. App. 262a-263a. These comments have no relevance to Burlington's liability for *quid pro quo* harassment, nor did the district court hold that they do.

ARGUMENT

The question presented to the Court is whether an employer is strictly liable for a supervisor's "quid pro quo" type threats where the employee has suffered no tangible job detriment as a result of the refusal to submit to the threats. Burlington recognizes that when the employee can demonstrate that the tangible aspects of her employment were affected by her refusal to submit to "quid pro quo" type threats, a strict liability standard applies; but when the employee has suffered no tangible job detriment, as in this case, the employer's liability should be judged under a negligence standard. Under this standard, where an employer

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[4] Moreover, Ellerth admitted that not reporting Slowik's conduct was a decision that she and her husband made independently of anything that occurred at Burlington. J.A. 115.

has an enforced sexual harassment policy and the employee knows of the policy and does not report the harassment to the company, the employer cannot be held liable unless it knew or should have known of the harassment.

Ellerth and her *amici* ask this Court to discard over twenty-five years of Title VII jurisprudence and create a new rule, unique to sexual harassment claims, which would hold employers strictly liable for *all* acts of sexual harassment committed by a supervisory employee, regardless of whether tangible aspects of employment are affected. Ellerth's position ignores the well-settled distinction that has been consistently recognized in employment discrimination cases between discrimination which causes a tangible job detriment and that which does not, is inconsistent with this Court's prior decisions and misconceives the application of agency principles under both common law and 42 U.S.C. § 1983.[5]

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[5] Although traditional Title VII analysis in harassment cases focuses on application of common law agency principles, this Court has wisely instructed in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986), that courts should "look to agency principles for guidance" in the area of sexual harassment law, rather than mechanically applying those principles, implicitly recognizing the distinctions between sexual harassment and other forms of discrimination. Standards of employer liability in this area are best formulated by analogizing to agency principles applied in employment discrimination law generally to arrive at a fair and reasonable rule appropriate to the circumstances of sexual harassment cases.

I. STRICT LIABILITY SHOULD NOT BE APPLIED UNDER TITLE VII WHERE THE EMPLOYEE HAS SUFFERED NO TANGIBLE JOB DETRIMENT

A. Applying a Negligence Standard Where No Tangible Job Detriment Has Occurred is Consistent with this Court's Decision in *Meritor* and With the Distinctions Observed by a Majority of the Circuit Courts

Both this Court and the circuit courts of appeals have recognized that strict liability applies only to Title VII actions where an employee has suffered a tangible job detriment as a result of discrimination. In *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986), this Court held that "the language of Title VII is not limited to 'economic' or 'tangible' discrimination," and therefore prohibits sexual harassment which "has created a hostile or abusive working environment." 477 U.S. at 64, 67. However, this Court also cautioned that the strict liability rules which govern employer liability for "tangible" discrimination did not necessarily apply to sexual harassment claims where the tangible aspects of employment had not been affected. 477 U.S. at 72. This Court observed that the language of Title VII which defines "employer" to include any "agent" of an employer "surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held liable." *Id.* Thus, this Court held that the Court of Appeals erred in concluding "that an employer is absolutely liable for sexual harassment practiced by supervisory personnel, whether or not the employer knew or should have known of the misconduct." *Id.*

The circuit courts of appeals have uniformly recognized a distinction between "*quid pro quo*" sexual harassment, for which employers may be held strictly liable, and "hostile work environment" sexual harassment, for which the employer is

held to a negligence standard. *See, e.g., Davis v. City of Sioux City*, 115 F.3d 1365, 1367 (8th Cir. 1997); *Nichols v. Frank*, 42 F.3d 509, 513-14 (9th Cir. 1994); *Bouton v. BMW of North America, Inc.*, 29 F.3d 103, 106-07 (3d Cir. 1994). A clear majority of the circuits have distinguished *quid pro quo* harassment from hostile work environment harassment by focusing on whether the employee has suffered a tangible job detriment as a result of the harassment. *Gary v. Long*, 59 F.3d 1391, 1395 (D.C. Cir.), *cert. denied*, 116 S.Ct. 569 (1995); *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 898 (1st Cir. 1988); *Spencer v. General Electric Co.*, 894 F.2d 651, 658 (4th Cir. 1990); *Ellert v. University of Texas, at Dallas*, 52 F.3d 543, 545 (5th Cir. 1995); *Kauffman v. Allied Signal, Inc.*, 970 F.2d 178, 187 (6th Cir.), *cert. denied*, 506 U.S. 1041 (1992); *Cram v. Lamson & Sessions Co.*, 49 F.3d 466, 473 (8th Cir. 1995); *Sauers v. Salt Lake County*, 1 F.3d 1122, 1127 (10th Cir. 1993); *Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554, 1564 (11th Cir. 1987).

This categorization of sexual harassment claims into *quid pro quo* and hostile work environment harassment is necessary to preserve *Meritor*'s edict that employers not be held "absolutely liable" for all sexual harassment committed by supervisory employees. Determining the standard of employer liability according to whether the employee has suffered a tangible job detriment recognizes that Congress did not intend for Title VII to remedy all indignities which may occur in the workplace. *See, e.g., Harris v. Forklift Systems, Inc.*, 507 U.S. 17, 21 (1993) (utterance of a single offensive epithet does not violate Title VII); *Patel v. Allstate Ins. Co.*, 105 F.3d 365, 373 (7th Cir. 1997) (Title VII does not cover employee's allegations that her supervisor required her to retype and rewrite letters and faxes and to submit a monthly typing practice schedule, denied her permission to retrieve a folder from his office and reprimanded her in front of others).

Under the distinction observed by a majority of the circuit courts, and which Burlington asks this Court to adopt, employers are absolutely responsible under the law for discrimination which affects tangible benefits which employees receive, such as discrimination in hiring, firing, promotion and pay. Employers are responsible for "non-tangible" discrimination which nonetheless affects the "terms and conditions" of employment only if the employer knows or should know of the condition and fails to take prompt remedial action or is otherwise negligent.[6]

Thus, by arguing that this Court should apply strict liability to all harassment by supervisory employees, Ellerth and *amici* urge this Court to overturn *Meritor*, which specifically rejected such a standard of employer liability. Ellerth and *amici* also seek to abolish the distinction which the circuit courts have developed over more than twenty-five years of jurisprudence between *quid pro quo* and hostile work environment in favor of a standard which none of the circuit courts have deemed fit to apply under Title VII.

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[6] Contrary to the assertions of Ellerth and her *amici*, Burlington does not propose that employees be *required* to report all harassment which does not rise to a *quid pro quo*. The negligence standard can be satisfied, for example, if the employer fails to promulgate or enforce a sexual harassment policy or knows of the supervisor's history of sexual harassment, even if the employer is unaware of the specific acts of harassment alleged. For this reason, the standard proposed by Burlington is not comparable to the proposed amendment to the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, described in Ellerth's brief.

B. Limiting Strict Liability to Situations Where Employees Have Suffered A Tangible Job Detriment Comports With the Standards Applied to Other Forms of Discrimination Prohibited by Federal Law

The same distinction between discrimination affecting tangible aspects of employment, for which an employer may be held strictly liable, and "non-tangible" discrimination, for which an employer may be liable only if it knows of the harassment and fails to remedy it, is observed throughout federal employment discrimination law. In the area of race discrimination, for example, the courts of appeal have uniformly ruled that a case of racial harassment[7] under Title VII or 42 U.S.C. § 1981 cannot be established merely by showing that the employee was subjected to racial slurs or other hostility sufficiently severe and pervasive to affect the terms and conditions of employment. Rather, an employer is liable for racial harassment only if the employer knew or should have known of the harassment and failed to take prompt and remedial action in response. *Ward v. Bechtel Corp.*, 102 F.3d 199, 202-03 (5th Cir. 1997); *Dennis v. County of Fairfax*, 55 F.3d 151, 155 (4th Cir. 1995); *Jeffries v. Metro-Mark, Inc.*, 45 F.3d 258, 259 (8th Cir.), *cert. denied*, 516 U.S. 830 (1995); *Risinger v. Ohio Bureau of Workers' Compensation*, 883 F.2d 475, 481-83 (6th Cir. 1989).

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[7] Racial harassment is, by definition, discrimination which does not cause tangible job detriment but "significantly and adversely affects the psychological well-being of an employee because of his or her race." *Gilbert v. City of Little Rock, Arkansas*, 722 F.2d 1390, 1394 (8th Cir. 1983), *cert. denied*, 466 U.S. 972 (1984).

A negligence standard is applied even where the racial harassment was allegedly committed by a supervisor. *See Dennis*, 55 F.3d at 153 ("We conclude that where an employer implements timely and adequate corrective measures after harassing conduct has come to its attention, vicarious liability should be barred regardless of the specific motivation for the wrongdoing or the particular cause of action"); *Willis v. Ray Sumlin Constr. Co.*, 68 Fair Empl. Prac. Cas. (BNA) 1451, 1454-55 (N.D. Ala. 1995) ("Section 1981 imposes liability on corporations which are, or should be, aware that their work environment is hostile but take ineffective or no corrective action. It is not, as [plaintiff] construes it, a corporate guarantee that a hostile work environment shall not exist at the company. Nor does it require an employer to be aware, at all times, of all the actions of its employees.").

Likewise, employers are not liable for workplace harassment which is based upon other protected characteristics, such as religion or national origin, unless the employer knew or should have known of the harassment, even where the alleged harasser is a supervisor. *See, e.g., Amirmokri v. Baltimore Gas and Elec. Co.*, 60 F.3d 1126, 1130 (4th Cir. 1995) ("Liability [for national origin harassment] may be imputed to the employer if the employer had actual or constructive knowledge of the existence of a hostile working environment and took no prompt or remedial action"); *Sarin v. Raytheon Co.*, 905 F. Supp. 49, 52 (D. Mass. 1995) (plaintiff in national origin and religious harassment case must make a showing that "the employer knew or should have known of the [harassing] conduct").

Hence, the strict liability rule which Ellerth and her *amici* ask this Court to apply to supervisor sexual harassment cases is at odds with the standards of employer liability existing under Title VII generally, as well as with *Meritor* and

prevailing sexual harassment law. Ellerth and *amici* apparently intend either to create a special rule of employer liability for sexual harassment cases or to turn Title VII into a "corporate guarantee" of equal treatment in all aspects of employment, tangible and non-tangible, making employers responsible for every act and every comment of their supervisory employees. Neither approach can be justified under *Meritor* or the language of Title VII.

A rule of strict liability for all supervisor conduct is ill-advised for the additional reason that it will create an impossible burden on employers to monitor their supervisory employees. Employers who may have thousands of supervisory employees (and even those who have but a few) cannot be reasonably expected to control all interactions between them and subordinate employees, both within the workplace and other work-related venues, such as conventions and trade shows, and in places where employees congregate, such as bars and restaurants. Nor can employers police personal relationships that develop between employees to ensure that these relationships are consensual. The only methods available to employers to prevent all supervisor harassment would be incredibly invasive of employee privacy (such as eavesdropping on telephone conversations and E-mail or regulating workplace romances) and interfere substantially with productivity. As the authorities cited above demonstrate, in every other area of discrimination law, courts have recognized that the strict liability standard which Ellerth and *amici* urge places unreasonable burdens on employers and is therefore inappropriate.

C. Neither Common Law Agency Principles Nor the Agency Principles Applied to Section 1983 Claims Justify Holding Employers Liable for All Acts of Supervisors or for *Quid Pro Quo* Type Threats

The position advanced by Ellerth and her *amici* that employers should be strictly liable under Title VII for all actions of their supervisory employees because a supervisor acts for the employer at all times and in all circumstances in which the supervisor's authority is implicated has absolutely no support in either common law agency principles or, as Ellerth contends, in this Court's decisions under 42 U.S.C. § 1983. Nor do these sources of law justify imposing strict liability on employers under the circumstances of this case.

1. Strict Liability is Not Warranted Under the Principles of the *Restatement (Second) of Agency*

Ellerth concedes that most of the traditional common law grounds for finding a principal vicariously liable for the acts of its agent are inapplicable to sexual harassment of employees by supervisors. As Ellerth states, "[F]ew if any companies give supervisors apparent authority to discriminate, and a supervisor who acted out of simple animus toward women . . . could not readily be said to be acting to advance the interests of his employer and thus to be acting within the scope of his employment." Resp. Br. 16.

Ellerth nonetheless premises employer liability for supervisor sexual harassment on *Restatement (Second) of Agency* § 219(2)(d), which provides in part that an employer may be liable for actions outside the scope of employment if an employee is "aided in accomplishing the tort by the existence of the agency relation." The defect in this reasoning is that courts have interpreted Section 219(d)(2) as referring

to conduct by the employee which seems "regular on its face," and thereby induces a reasonable belief in another that the employee is acting under the employer's authority. *See Smith v. Metropolitan School Dist., Perry Township*, 128 F.3d 1014, 1029 (7th Cir. 1997) (cert. petition filed March 16, 1998). Such is rarely, if ever, the case in the context of supervisor sexual harassment.

Here, for example, Ellerth knew that Slowik's alleged conduct violated Burlington's policy against sexual harassment and therefore could not have reasonably believed that his conduct was an official action of Burlington. Indeed, where an employer has an anti-sexual harassment policy and the employee is aware of that policy, the employee cannot reasonably believe that the harasser acts under the employer's authority. *See, e.g., Andrade v. Mayfair Management, Inc.*, 88 F.3d 258, 262 (4th Cir. 1996); *Gary v. Long*, 59 F.3d 1391, 1397 (D.C. Cir. 1995); *Bouton v. BMW of North America, Inc.*, 29 F.3d 103, 109 (3d Cir. 1994).[8]

Amici the United States and the Equal Employment Opportunity Commission (the "EEOC") argue that threats of adverse job consequences, such as those which Ellerth alleges that Slowik made here, are as much within the scope of a supervisor's employment as is the hiring and firing of employees "because the employer's delegation of authority

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[8] Ellerth erroneously states in her brief that employer liability for discrimination in hiring, firing and other tangible aspects of employment is based upon Section 219(2)(d). In fact, such liability arises under Section 219(1) of the *Restatement (Second) of Agency*, which applies to actions within the scope of the supervisor's employment. *See, e.g., Henson v. City of Dundee*, 682 F.2d 897, 910 (11th Cir. 1983). As discussed *supra*, mere threats of adverse job consequences and other intangible forms of discrimination are not within the scope of the supervisor's authority.

makes the injury suffered by the victim possible." Therefore, the EEOC contends, where those threats are linked to sexual propositions, employers are liable under Section 219(1) of the *Restatement*.

The EEOC's argument relies upon an obviously overbroad definition of "scope of employment." Acts such as hiring, firing or promotion of employees are necessarily within the scope of a supervisor's employment because these acts affect the tangible aspects of the employment relationship with that employee. Even if the employer does not endorse the supervisor's discriminatory motive, the supervisor has undeniably wielded the authority entrusted to him by the employer, and the employer may be liable. On the other hand, a supervisor's mere utterance of words to an employee, such as when a supervisor makes a "*quid pro quo*" threat, cannot be an exercise of the supervisor's authority. Unless the threat is carried out, the employer has not acted through its supervisor and the tangible aspects of the employment relationship have not been affected.

Indeed, where a supervisor threatens adverse job action to solely satisfy his personal pleasure, but does not follow through on those threats, the supervisor's conduct is clearly not within the scope of employment. Although the employee may be intimidated, humiliated or degraded by the conduct, the employee's status with the employer has not been changed by the supervisor's conduct.[9] The supervisor has acted completely for his own purposes of obtaining sexual

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[9] Ellerth and her *amici* devote substantial effort to demonstrating that unfulfilled threats can cause emotional harm to victims of harassment. Burlington has never denied that such conduct can cause harm and that an employer may be liable *if* the employer knew or should have known of the conduct which caused the harm. However, under no area of the law is the rule of vicarious liability determined by the extent of a plaintiff's damages.

gratification and, in point of fact, has impeded the purposes of the employer. Such conduct is not within the scope of the supervisor's employment, and liability therefore does not lie under Section 219 of the *Restatement*.

Interestingly, the EEOC has taken a position in this case which seems to be in contrast to the position which it took before this Court in *Meritor*. There, the EEOC defined *quid pro quo* sexual harassment as "harassment which affects *tangible job benefits* and is manifested in a supervisory employment decision." Brief for the United States and the Equal Opportunity Employment Commission in *Meritor Savings Bank, FSB v. Vinson*, No. 84-1979 [hereinafter "EEOC *Meritor* Br."] at 23. The EEOC stated that to impute the sexually harassing actions of a supervisor "automatically and strictly to the employer -- as is appropriate in 'quid pro quo' cases -- is not only doctrinally unwarranted by principles of agency law but practically unfair to the employer . . . ." EEOC *Meritor* Br. at 25. Thus, the EEOC's argument that supervisor conduct which does not affect tangible job benefits is nonetheless within the scope of the supervisor's employment is not only contrary to the *Restatement* but to the EEOC's own position in *Meritor*.

The EEOC argues that "*quid pro quo*" threats and other sexual harassment which do not result in tangible job detriment is nonetheless *quid pro quo* harassment under the

EEOC's own guidelines.[10] The relevant section of those guidelines reads as follows:

Sec. 1604.11 Sexual harassment.

> (a) Harassment on the basis of sex is a violation of section 703 of title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

29 C.F.R. § 1604.11(a).

The EEOC's position in this case is that both subsections (1) and (2) constitute *quid pro quo* sexual harassment. However, nowhere in those Guidelines does the EEOC state that, in subparts (1) *and* (2), it is defining *quid pro quo* harassment. Rather, the Policy Guidance On Current Issues

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[10] This Court has held that because Congress did not confer upon the EEOC authority to promulgate rules and regulations under Title VII, "courts properly may accord less weight to such guidelines than to administrative regulations which Congress has declared shall have the force of law or to regulations which under the enabling statute may themselves supply the basis for imposition of liability." *General Elec. Co. v. Gilbert*, 429 U.S. 125, 141 (1976). Where, as here, the guideline in question was not issued contemporaneously with the enactment of Title VII, it is entitled to even less deference. *Gilbert*, 429 U.S. at 142.

Of Sexual Harassment, dated March 19, 1990, published by the EEOC after its Guidelines were issued in 1980 and its most recent pronouncement, specifically defines *quid pro quo* harassment as occurring only under subpart (2).[11] The Guidelines state that "[*q*]*uid pro quo* harassment" occurs when "submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual," and cite 29 C.F.R. Sec. 1604.11(a)**(2)** [emphasis added]. *Id*. Thus, the EEOC has created shifting definitions in that it has taken inconsistent positions before this Court on what standard of liability should be applied to sexual harassment and its own publications offer inconsistent definitions of *quid pro quo* harassment.[12]

2. Municipalities Are Not Strictly Liable for Their Agents' Conduct Under 42 U.S.C. § 1983

Ellerth also extensively contends that Congress intended to incorporate into Title VII the vicarious liability principles promulgated by this Court under the Reconstruction-era civil rights statutes, in particular 42 U.S.C. § 1983. However, the agency principles which this Court has adopted under Section 1983 are directly contrary to those which Ellerth and her *amici* advance in this case.

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[11] The EEOC's Policy Guidance on Sexual Harassment is intended to provide guidance to employers on compliance with Title VII. The Policy Guidance states that it "will remain in effect until rescinded or superseded."

[12] As this Court stated in *Gilbert*, "We have declined to follow administrative guidelines in the past when they conflicted with earlier pronouncements of the agency." 429 U.S. at 143.

In *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 (1978), this Court unequivocally held that Section 1983 does not "impose liability vicariously on governing bodies solely on the basis of the existence of an employee-employer relationship with a tortfeasor." 436 U.S. at 692. Consequently, this Court held, "a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents." *Id.* at 694. Through its most recent decisions on the question, this Court has "consistently refused to hold municipalities liable under a theory of *respondent superior*." *Board of County Commissioners of Bryan County, Oklahoma v. Brown*, 117 S. Ct. 1382, 1388 (1997); *see also City of Canton v. Harris*, 489 U.S. 378, 392 (1989); *City of St. Louis v. Praprotnik*, 485 U.S. 112, 122 (1988); *Pembaur v. City of Cincinnati*, 475 U.S. 469, 479 (1986).

The Section 1983 cases cited by Ellerth, including, *inter alia*, *West v. Atkins*, 487 U.S. 42 (1988); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982) and *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), concern only the *individual* liability of government agents for constitutional violations committed in the course of their official duties. These cases do not address the question analogous to that presented in this case, that is, the vicarious liability of these agents' employers for their on-the-job misconduct. Consequently, these authorities do not inform this Court's decision here.[13] Rather, the Court should adopt a standard of vicarious liability in sexual harassment cases which do not involve tangible job detriment comparable to

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[13] For the same reason, the citations of Ellerth and her *amici* to the criminal law of attempt and to Hobbs Act criminal prosecutions are irrelevant to the issue at hand. These cases explore only individual criminal liability for conduct, not the liability of the employer of the perpetrator for the criminal conduct.

that which this Court has adopted in *Monell* and the other cases cited above, limiting an employer's liability to circumstances where the employer knew or should have known of the harassment and failed to remedy it.

II. THE DISTRICT COURT PROPERLY APPLIED A NEGLIGENCE STANDARD TO THIS CASE

There is no evidence in the record that Ellerth suffered any tangible job detriment as a result of Slowik's alleged sexual harassment. On the contrary, Ellerth received a promotion which raised her salary by $4000 and entitled her to an annual bonus after less than a year at Burlington and only two weeks after Slowik allegedly told her that she was not "loose enough." J.A. 123. Consequently, her claim should be analyzed under the negligence standard applicable to hostile work environment claims, under which Burlington may be liable only if it knew or should have known of the harassment and failed to prevent or remedy it.

Ellerth cannot show that Burlington was negligent in failing to prevent Slowik's alleged harassment. Ellerth admitted that Burlington had a policy prohibiting sexual harassment and that she was aware of this policy. J.A. 111-12. There is no evidence in the record that Burlington had any knowledge, actual or constructive, of Slowik's alleged harassment. Ellerth herself never reported the alleged harassment to her supervisor, Burlington's human resources department or anyone in authority at Burlington. J.A. 112-13. As the district court correctly concluded, "In view of Ellerth's acknowledgement of her deliberate failure to utilize the equal employment opportunity procedures outlined in the [employee] handbook, and her failure to take any other measures to notify appropriate Burlington management personnel about her harassment, she has failed to raise a genuine issue of material fact as to whether Burlington knew

or should have known about Slowik's conduct." Pet. App. 273a (footnote omitted).

CONCLUSION

The judgment of the court of appeals on the issue before the Court should be reversed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1997

BURLINGTON INDUSTRIES, INC., PETITIONER

v.

KIMBERLY B. ELLERTH

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

When a supervisor threatens an employee with adverse job consequences for failure to comply with a sexual demand, must the employee either submit to the demand or suffer the adverse job consequence in order to maintain an action against the employer under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, for altering the terms or conditions of employment on the basis of sex.

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BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, prohibits discrimination in terms and conditions of employment on the basis of sex. The Attorney General is responsible for enforcing Title VII with respect to public employers. 42 U.S.C. 2000e-5(f)(1). The United States, as an employer, has a strong interest in ensuring the fair and balanced enforcement of Title VII. The Equal Employment Opportunity Commission (EEOC) has authority to enforce Title VII with respect to private employers. The EEOC participated as amicus curiae in this case both in the panel and the en banc proceedings in the court of appeals.

STATEMENT

1. Because this case comes to this Court on petitioner's motion for summary judgment, the evidence must be viewed in the light most favorable to respondent. *United States* v. *Diebold, Inc.*, 369 U.S. 654, 655 (1962).

When viewed in that light, the summary judgment record establishes the following:

In March 1993, respondent Kimberly B. Ellerth applied for a marketing job with petitioner Burlington Industries. Pet. App. 243a. After an initial interview with Mary Strenk Fitzgerald, an accounts manager, respondent interviewed with Fitgerald's supervisor, Theodore Slowik, a vice president of sales and marketing. *Id.* at 243a-244a. During the latter interview, Slowik asked respondent whether she and her husband were planning on having a family and whether they were "practicing at it." *Id.* at 244a-245a. Slowik also stared at respondent's breasts and legs for prolonged periods of time. *Id.* at 245a. About one week later, Slowik offered respondent a job in which respondent would report to Fitzgerald, and respondent accepted the offer. *Id.* at 244a. Slowik was stationed in New York, while Fitzgerald and respondent were stationed in Chicago. *Ibid.*

Respondent's work required her to meet with Slowik one or two days every month or two in Chicago, New York, and elsewhere, and to speak with him on the telephone approximately once per week. Pet. App. 244a. In those encounters and conversations, Slowik made sexual remarks, veiled threats, and unwelcome advances. During one trip to New York, Slowik told respondent several off-color offensive jokes. *Id.* at 245a. At a business lunch at which Slowik, respondent, and petitioner's vice president of international sales, Angelo Brenna, were present, Slowik told numerous offensive sexual jokes and rubbed respondent's knee under the table. *Id.* at 245a-246a. Respondent pulled her leg away when he touched it. *Id.* at 246a. As the three left the restaurant, Slowik walked several feet behind respondent and commented, "You have got great legs, Kim," and then asked Brenna what he thought. *Ibid.*

At another business meeting in Greensboro, North Carolina, Slowik invited respondent to join him at the

lounge, and respondent accepted. Pet. App. 247a. While there, Slowik commented that the female band members had nice breasts, nice legs, and nice skimpy outfits. *Ibid.* After looking at respondent's breasts, he then said, "You are a little lacking in that area, aren't you Kim." *Ibid.* Slowik also told respondent that she "ought to loosen up," and stared at respondent's legs and breasts for prolonged periods. *Ibid.* Upon leaving the lounge, Slowik said, "You know, Kim, I could make your life very hard or very easy at Burlington." *Ibid.* Respondent understood that to mean that she would have to have sex with Slowik in order to succeed at petitioner's company. *Ibid.*

After the Greensboro trip, Slowik made work-related calls to respondent on a weekly basis. Pet. App. 250a. Slowik used those calls as an opportunity to engage in sexual innuendo. He made comments such as, "How are those legs of yours, Kim;" he asked respondent whether she was still "practicing" having a family with her husband; he refused to give respondent a job assignment until she told him what she was wearing; and he told respondent that her job would be a "whole heck of a lot easier" if she wore short skirts. *Id.* at 250a-251a.

During one of Slowik's visits to the Chicago office, respondent was on her knees folding fabric samples, when Slowik said, "on your knees again, Kim?" Pet. App. 248a. Respondent understood the comment as a reference to fellatio. *Ibid.* During that same trip, while using respondent's desk to make a telephone call, Slowik said to respondent, "It's nice to have my butt where your butt was, Kim." *Ibid.*

At the annual company holiday party, Slowik patted respondent on the rear. Pet. App. 248a. During an interview for a promotion to the position of sales representative for the Midwest territory, Slowik rubbed respondent's knee while asking her whether the frequent travel associated with the position she was seeking would make her husband

miss her. *Id.* at 248a-249a. During that same interview, Slowik admitted that he had told others that he was hesitant to promote respondent because she was not "loose enough" for him. *Id.* at 249a. Two weeks later, Slowik promoted respondent to a position in which she would report to Patrick Lawrence. *Id.* at 244a. Lawrence, in turn, reported to Slowik. *Ibid.* At the same time, Slowik made a sexually inappropriate comment that reduced respondent to tears. *Id.* at 249a.

Petitioner's employee handbook included a statement that "[T]he company will not tolerate any form of sexual harassment in the workplace. * * * [I]f you have any questions or problems, or if you feel you have been discriminated against, you are encouraged to talk to your supervisor or human resources representative or use the grievance procedure promptly." Pet. App. 272a. Respondent did not talk to either of her immediate supervisors or the human resources manager about Slowik's treatment of her. *Id.* at 251a. Respondent feared that such a complaint would put her job in jeopardy. *Ibid.*

In May 1994, Lawrence cautioned respondent to be more careful about returning telephone calls to customers. Pet. App. 252a. Respondent left a message on Lawrence's telephone answering machine that she was quitting her job, and faxed him a letter to the same effect. *Ibid.* Three weeks later, she sent a detailed letter explaining that she was quitting because of Slowik's harassment of her. *Ibid.*

2. In February 1995, respondent filed suit against petitioner in the United States District Court for the Northern District of Illinois. She alleged that petitioner, through its supervisor, Slowik, discriminated against her on the basis of sex by sexually harassing her during the course of her employment, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* Pet. App. 241a-242a.

The district court granted summary judgment for petitioner. Pet. App. 241a-287a. The court concluded that a reasonable jury could find that Slowik had subjected respondent to a hostile work environment. *Id.* at 261a-266a. The court held, however, that petitioner could not be held liable for Slowik's conduct in that regard. *Id.* at 266a-287a. The court concluded that (1) Slowik's harassment of respondent was not within the scope of his employment (*id.* at 268a-270a); (2) petitioner was neither negligent nor reckless in remaining unaware of the harassment (*id.* at 270a-273a); and (3) Slowik did not act with apparent or delegated authority in harassing respondent (*id.* at 274a-280a).

The court refused to assess petitioner's liability under a *quid pro quo* theory, because it determined that respondent had not raised that theory of liability in her complaint. Pet. App. 284a, 264a n.10. The court noted, however, that "imbedded in Slowik's harassment of Ellerth is a *quid pro quo* proposition," and that "[i]t would not be unreasonable to conclude that every effort toward achievement that Ellerth made at Burlington was tainted by Slowik's threat, 'I could make life very hard for you.'" *Id.* at 264a-265a.

3. A panel of the Seventh Circuit reversed the grant of summary judgment for petitioner and remanded for further proceedings. Pet. App. 209a-239a. The panel held that respondent's complaint encompassed a claim for *quid pro quo* sexual harassment, *id.* at 219a-220a, and that respondent's evidence raised a genuine issue of material fact to support that theory, *id.* at 220a-221a. The panel also held that petitioner could be held liable under both *quid pro quo* and hostile work environment theories. *Id.* at 221a-233a. Applying common law agency principles, the court held that respondent's evidence supported a finding that Slowik was acting within the scope of his employment when he harassed her. *Id.* at 230a-231a.

4. On rehearing en banc, the court of appeals reversed in part and affirmed in part. Pet. App. 1a-207a. The court held that respondent had presented sufficient evidence to resist summary judgment on her *quid pro quo* claim, *id.* at 6a-7a, but that she had waived her claim of a hostile work environment by disavowing any claim that petitioner was negligent, *id.* at 28a (Flaum, J.), 59a (Posner, C.J.).[1] The 11-judge court[2] issued a per curiam decision, followed by seven separate opinions.

a. Judge Flaum (joined by Judges Cummings, Bauer, Kanne (in part) and Evans) filed the lead opinion. Pet. App. 8a-28a. In that opinion, Judge Flaum concluded that an employer is vicariously liable when a supervisor engages in *quid pro quo* harassment, and that *quid pro quo* harassment includes making submission to sexual demands a condition of tangible job benefits. *Id.* at 9a-10a. In reaching that conclusion, Judge Flaum relied on the agency principle that an employer is liable for the acts of an agent that are made possible by the employer's delegation of authority to the agent. *Id.* at 12a. He reasoned that, "because a supervisor would be unable to engage in *quid pro quo* harassment without the authority and power furnished by the employer, the supervisor's conduct is properly imputed to the employer." *Id.* at 13a. Employer liability for *quid pro quo* harassment, Judge Flaum added, also best serves Title VII's goal of deterrence, because it provides employers with "an incentive to foster a culture in which harassment is not tolerated." *Id.* at 16a.

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[1] Because Title VII does not distinguish between the two types of sexual harassment, it would be more accurate to say respondent waived her claim that petitioner was negligent with regard to sexual harassment; to the extent negligence is not necessary, her claim is not waived, regardless of the label that is attached to the discrimination.

[2] A 12th judge (Cudahy) participated only with regard to a different case that was consolidated with this one for purposes of appeal. Pet. App. 29a.

Judge Flaum concluded that proof of an adverse job consequence is not a necessary element of a *quid pro quo* claim. Pet. App. 17a. Instead, it is sufficient if plaintiff can show that a supervisor has issued a serious threat that "clearly conditions concrete job benefits or detriments on compliance with sexual demands." *Ibid.* Judge Flaum explained that "a clear and serious *quid pro quo* threat alters the 'terms and conditions' of employment in such a way as to violate Title VII and therefore can constitute an actionable claim even if the threat remains unfulfilled." *Ibid.*

Judge Flaum concluded that agency principles support employer liability for such threats, because "[m]aking a clear and unambiguous threat of an adverse job consequence is an exercise of the supervisor's delegated authority, just as actually inflicting the consequence invokes that authority." Pet. App. 17a. Judge Flaum also noted that "[a] supervisor's unambiguous communication that adverse job action is imminent if sexual favors are not forthcoming causes the employee real emotional strife," *id.* at 19a, and that Congress specifically sought to provide compensation for such emotional damage when it enacted the 1991 amendments to Title VII, *id.* at 18a. Imposing employer liability in such circumstances, Judge Flaum added, serves the goal of preventing such abuse from occurring by "creating incentives for companies to take steps in hiring and training their supervisors." *Id.* at 18a-19a. Judge Flaum also made clear that, in order to establish a valid claim, a victim must show that she "reasonably believed that it was within the supervisor's power to affect the conditions of the plaintiff's job." *Id.* at 19a.

Judge Flaum concluded that respondent had put forward sufficient evidence to resist a motion for summary judgment on her *quid pro quo* harassment claim. Judge Flaum relied on Slowik's statements that he could make respondent's life hard or easy, that he did not have time for her

unless she told him what she was wearing, that wearing shorter skirts would make her job easier, and that he was hesitant to promote her because she was not loose enough for him. Pet. App. 27a. From those statements, Judge Flaum concluded, "a reasonable jury could conclude that Slowik was conditioning or threatening to base 'the terms and conditions' of [respondent's] employment on [respondent's] catering to Slowik's sexual desires, and thus subjected her to compensable *quid pro quo* harassment." *Ibid.* Judge Flaum concluded that respondent had waived her hostile environment claim by conceding that petitioner had not been negligent. *Id.* at 28a.

b. Judge Kanne filed a concurring opinion. Pet. App. 33a-34a. He concluded that an employee can establish a *quid pro quo* claim without proof of an adverse employment consequence. *Id.* at 33a. He concluded, however, that an employer should be liable for such a *quid pro quo* threat only if the plaintiff can establish employer negligence in failing to obviate the threat. *Ibid.*

c. Chief Judge Posner (joined by Judge Manion) filed an opinion dissenting as to Ellerth. Pet. App. 35a-59a. In his view, when a supervisor brings about a significant alteration in the terms or conditions of the victim's employment, such as by denying a promotion or blocking a pay raise, the employer should be vicariously liable. *Id.* at 49a. Chief Judge Posner believed that employers should be responsible for monitoring such "company acts" through a process of review. *Id.* at 49a-50a. On the other hand, Chief Judge Posner concluded that vicarious liability was not appropriate when the supervisor threatens adverse employment consequences, but does not impose them, because "there is no way in which a system for vetting such acts would catch him." *Id.* at 50a-51a. Applying those principles, Chief Judge Posner concluded that petitioner could not be held liable on a *quid pro quo* theory, because Slowik never committed a company act. *Id.* at 57a-58a. He concluded

that petitioner had waived her claim of a hostile work environment by waiving a claim of negligence. *Id.* at 59a.

d. Judge Coffey filed an opinion dissenting as to Ellerth. Pet. App. 60a-142a. He agreed with Chief Judge Posner that plaintiffs may not establish *quid pro quo* harassment without showing "that they have actually suffered a tangible, job-related loss (such as being fired or denied a promotion) for refusing to go along with the harasser's sexual demands." *Id.* at 105a (emphasis omitted). Because respondent failed to show that she suffered such a tangible job-related loss, Judge Coffey concluded, she failed to establish a claim of *quid pro quo* harassment. *Id.* at 104a. He further would have held that an employer is liable for *quid pro quo* harassment only when there is proof of negligence. *Id.* at 129a. And he concluded that petitioner had waived her claim of negligence. *Id.* at 130a.

e. Judge Easterbrook filed an opinion concurring in the result as to Ellerth. Pet. App. 143a-152a. He concluded that employer liability should be determined by reference to state agency law, *id.* at 143a, and that Illinois imposes vicarious liability on employers for supervisory harassment, regardless of whether the harassment takes the form of a *quid pro quo* or a hostile environment, *id.* at 148a. Judge Easterbrook viewed respondent as having alleged and preserved a hostile work environment claim, not a *quid pro quo* claim, however, because Slowik did not carry through on his implicit threat that he would hinder respondent's advancement if she did not provide sexual favors and because respondent did not submit to that threat. *Id.* at 151a-152a.

f. Judge Manion (joined by Chief Judge Posner) filed an opinion dissenting as to Ellerth. Pet. App. 153a-172a. His views essentially tracked those of Chief Judge Posner that an employer is strictly liable only for company acts, *id.* at 155a-155a, and that in order to establish a claim of *quid pro*

quo harassment, an employee must show that the supervisor imposed a tangible job detriment, *id.* at 159a.

g. Judge Wood (joined by Judge Easterbrook and Judge Rovner) filed an opinion concurring in the result as to Ellerth. Pet. App. 173a-207a. Judge Wood concluded that when a supervisor, acting within the scope of his authority as determined under the applicable state law, engages in discriminatory conduct, the employer should be liable under principles of respondeat superior, without regard to whether the acts are characterized as *quid pro quo* demands, or the infliction of a hostile environment. *Id.* at. 175a. Judge Wood rejected the distinction between *quid pro quo* demands and a hostile work environment, because "[i]n the real world, sexual harassment does not sort itself into tidy categories," and there is no clear demarcation between the two. *Id.* at 177a.

Applying the scope of employment test, Judge Wood concluded that respondent had introduced sufficient evidence to defeat summary judgment. Pet. App. 205a-206a. Judge Wood believed that Slowik had acted within the scope of his employment when he refused to give respondent work assignments unless she described her physical appearance to him. *Ibid.* Judge Wood further concluded that, when interpreted in light of Slowik's remark that he could make life for respondent very easy or very hard, a jury could find that respondent "had to play the role of sex object in order to obtain desirable work assignments (and thus to advance in the company)." *Id.* at 205a-206a. Judge Wood also concluded that respondent had not waived her right to support her hostile work environment claim on a negligence theory, and that she had presented sufficient evidence to support a finding that petitioner was negligent. *Id.* at 206a-207a.

SUMMARY OF ARGUMENT

A. Because the term "*quid pro quo*" harassment does not appear in Title VII, there is no need to proceed on an elusive quest for its true meaning. Instead, the relevant inquiries in this case are whether a supervisor's threat of adverse job consequences for failure to submit to his sexual demands alters a "term" or "condition" of employment, and whether the "employer" is vicariously liable for such conduct under Title VII and agency principles. 42 U.S.C. 2000e-2(a)(1).

B. "Terms" of employment are "propositions, limitations, or provisions stated or offered for the acceptance of another and determining (as in a contract) the nature and scope of the agreement." *Webster's Third New International Dictionary* 2358 (1976). That definition is satisfied when a supervisor who has authority to grant a job benefit conditions that benefit on a subordinate's submission to his sexual demands. The employee may decide not to accede to the demand, and the supervisor may decide not to enforce it, and those decisions may affect the extent of recoverable damages. But as long as the employee reasonably believes that the threat is genuine, and the supervisor has authority to grant or withhold the benefit, the employee labors under a discriminatory "term" of employment.

Petitioner errs in contending that there can be no discrimination and no harm unless the employee submits or the supervisor retaliates. When a supervisor informs a woman that she may advance in the company only if she submits to the supervisor's sexual demand, and the supervisor does not establish such a condition on advancement for males, Title VII's test of discrimination is satisfied. *Oncale* v. *Sundowner Offshore Serv.*, No. 96-568 (Mar. 4, 1998), slip op. 5. And requiring a woman to labor under such a term of employment can cause real emotional strife.

Petitioner's effort to discount such harm as insufficiently tangible is based on a profound misunderstanding about the scope of Title VII's protections. Congress intended to strike at the entire spectrum of disparate treatment between men and women, not simply discrimination that causes tangible harm. *Meritor Savings Bank* v. *Vinson*, 477 U.S. 57, 64 (1986).

C. Under Title VII and common law agency principles, an employer is vicariously liable for discrimination that results from a supervisor's abuse of his delegated authority. That is why an employer is liable when a supervisor fires an employee because of her race or sex, regardless of whether the employer knew or should have known about the discrimination. That same principle is applicable here. Included in the supervisor's power to fire, promote, and evaluate is the power to threaten to use that power if certain conditions or requirements are not satisfied. Thus, when a supervisor abuses that delegated power by conditioning job benefits on submission to sexual demands, the employer is vicariously liable.

Petitioner's effort to limit vicarious liability to "company acts," such as promotions, pay raises, and terminations is unpersuasive. Petitioner's contention that vicarious liability should be limited to such acts rests on a mistaken factual premise—that discrimination in such acts is categorically easier for employers to detect. The reality is that, when a supervisor makes an adverse employment decision based on a subordinate's refusal to submit to a sexual demand, he will almost always explain the decision in ways that make it appear legitimate. Ease of detection depends on the facts of each case, not on the form of harassment.

Company acts are properly imputed to the employer for two reasons. First, they rest on an unambiguous invocation of company power. And second, there is no ambiguity about the wrongfulness of the conduct, making it relatively easy for management to communicate a clear prohibition. Both of those characteristics are also present, however, in any case in which a supervisor threatens to impose an adverse employment consequence if a subordinate does not submit to a sexual demand. For purposes of imputing liability to the employer, it makes no difference whether the subordinate complies with the extortionate demand, refuses and suffers anxiety about the likely outcome, or refuses and is fired.

ARGUMENT

AN EMPLOYER IS LIABLE FOR DISCRIMINATION UNDER TITLE VII WHEN A SUPERVISOR THREATENS AN EMPLOYEE WITH ADVERSE JOB CONSEQUENCES FOR FAILURE TO SUBMIT TO HIS SEXUAL DEMANDS

A. The Relevant Inquiries Are Whether A Supervisor's Threat Of Adverse Job Consequences For Failure To Submit To His Sexual Demands Alters A "Term" Of Employment And Whether Such Conduct May Be Attributed To The "Employer"

1. Title VII of the Civil Rights Act of 1964 provides, in relevant part, that "[i]t shall be an unlawful employment practice for an employer * * * to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. 2000e-2(a)(1). In *Meritor Savings Bank* v. *Vinson*, 477 U.S. 57 (1986), the Court held that employment discrimination that takes the form of sexual harassment can violate Title VII. The Court explained that, "[w]ithout question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex." *Id.* at 64. The Court also held that such discrimination can alter the "terms, conditions, or privileges of employment." *Ibid.* That

phrase, the Court explained, "is not limited to 'economic' or 'tangible' discrimination," but instead "evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women.'" *Ibid.*

Based on that interpretation of the statutory terms, the Court in *Meritor* held that Title VII's protection against sexual harassment not only encompasses a prohibition against harassment that is "directly linked to the grant or denial of an economic *quid pro quo*," but also provides protection against sexual harassment that takes the form of a "hostile work environment." 477 U.S. at 65. The Court defined a hostile work environment as one in which the harassment is "sufficiently severe or pervasive "to alter the conditions of [the victim's] employment and create an abusive working environment." *Id.* at 67. The Court also referred to a hostile work environment as "non *quid pro quo* harassment." *Id.* at 65.

This Court's subsequent sexual harassment cases have all involved claims of a hostile work environment and have elaborated on the proof required to establish such a claim. In *Harris* v. *Forklifts Systems, Inc.*, 510 U.S. 17, 22 (1993), the Court held that a plaintiff must show that "the environment would reasonably be perceived, and is perceived, as hostile or abusive." In deciding whether a plaintiff has satisfied that standard, a factfinder should consider "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance"; *id.* at 23. In *Oncale* v. *Sundowner Offshore Services*, No. 96-568 (Mar. 4, 1998), the Court emphasized that a hostile work environment is not created by "genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex," and that "ordinary socializing in the workplace—such as male-on-male horseplay or intersexual flirtation," should not be

mistaken "for discriminatory 'conditions of employment.'" Slip op. 6. The Court has not yet addressed a claim of *quid pro quo* harassment.

2. In *Meritor*, the Court also addressed the question of when an employer is liable for a supervisor's sexual harassment of a subordinate. The court of appeals in that case had held that employers are always automatically liable for sexual harassment by their supervisors. 477 U.S. at 72. The employer argued that a policy against discrimination with a grievance procedure, coupled with an employee's failure to invoke that procedure, should insulate an employer from liability. *Ibid.* The Court rejected both of those per se rules. By defining "employer" to include any "agent," Congress indicated that it "wanted courts to look to agency principles for guidance." *Ibid.* The Court cautioned, however, that "common-law principles may not be transferable in all their particulars to Title VII." *Ibid.* *Meritor* therefore contemplates that, in deciding whether an employer is liable for sexual harassment in the workplace, a court should apply common law agency principles, modified to the extent necessary to conform to the purposes of Title VII.

3. Petitioner contends (Br. 16) that *quid pro quo* harassment occurs only when a supervisor demands sexual favors from an employee and the employee either submits to the demand or suffers a tangible job detriment for failing to submit. Under petitioner's proposed test, if the supervisor clearly states that he will take an adverse employment action unless the subordinate submits to his sexual demand, but the subordinate does not submit and the supervisor fails to impose the adverse employment consequence, the subordinate cannot establish a *quid pro quo* claim. Petitioner argues that his theory would have two consequences for cases in which there is neither submission nor retaliation. First, it would affect the standard for proving an alteration in the terms or conditions of em-

ployment: rather than proving that the supervisor demanded sexual favors in exchange for a job benefit that he had authority to grant, plaintiff would be required to show that the supervisor's conduct was so severe or pervasive that it created a hostile work environment. Br. 16 n.12, 18. Second, it would affect the standard for determining whether discrimination may be imputed to the employer. Rather than relying on a theory of vicarious liability, petitioner argues, plaintiffs would be required to show that the employer knew or should have known about the harassment and failed to take appropriate corrective action. Br. 21-23.

Petitioner's approach is misguided. The term *quid pro quo* harassment does not appear in Title VII. The relevant statutory inquiries are whether "discriminat[ion] * * * because of * * * sex" affects the "terms [or] conditions of employment," and whether such discrimination may be attributed to the "employer" under common law agency principles modified to the extent necessary to conform to Title VII's purposes. 42 U.S.C. 2000e-2(a)(1). Thus, rather than proceeding on an elusive quest for the true meaning of *quid pro quo* harassment, the better approach is to decide directly whether the statutory standards have been met. In particular, the first question is whether a supervisor's threat of adverse job consequences for failure to submit to his sexual demands alters a "term or condition" of employment, without regard to whether the employee later submits to the condition, or the supervisor later imposes the adverse job consequence. The second question is whether the "employer" is vicariously liable for such discrimination under common law agency principles modified to the extent necessary to conform to Title VII's purposes.

B. A Supervisor's Threat Of Adverse Job Consequences For Failure To Submit To His Sexual Demands Alters A "Term" Of Employment

1. "Terms" of employment are "propositions, limitations, or provisions stated or offered for the acceptance of another and determining (as in a contract) the nature and scope of the agreement." *Webster's Third New International Dictionary* 2358 (1976); see also *The Random House Dictionary of the English Language* 1956 (2d ed. 1987) (defining terms as "conditions or stipulations limiting what is proposed to be granted or done"). That definition is satisfied when a supervisor who has authority to grant a job benefit conditions that benefit on a subordinate's submission to his sexual demands. For example, if a supervisor in charge of promotion decisions makes clear that a subordinate's advancement in the company depends on her submission to his sexual demands, and no similar condition is placed on male employees, the subordinate immediately labors under a new, discriminatory term of employment. That "term" is that, in order to advance in the company, the employee, because of her sex, must submit to a sexual demand. The employee may decide not to accede to the demand, and the supervisor may decide not to enforce the term, and those decisions may affect the extent of damages that the subordinate may claim. But as long as the employee reasonably believes that the threat is genuine, and the supervisor has authority to grant or withhold the benefit, the employee labors under a discriminatory "term" of employment.

2. The EEOC's Guidelines reinforce that conclusion. Those Guidelines, "while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Meritor*, 477 U.S. at 65 (internal quotation marks and citations omitted). Since the EEOC's Guidelines first addressed the is-

sue of sexual harassment in 1980, they have provided in relevant part:

> Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive work environment.

29 C.F.R. 1604.11(a).

Subsection (1) is applicable here. When a supervisor says either implicitly or explicitly that an employment benefit depends on submission to a sexual demand, "submission to [the sexual demand] is made either explicitly or implicitly a term or condition of an individual's employment." Under subsection (1), the alteration in the terms of employment occurs at the moment when the supervisor verbally links a tangible job benefit to submission to his sexual demands, provided that the subordinate reasonably believes both that the threat is genuine and that the supervisor has authority to confer or withhold the benefit. In contrast, subsection (2) applies when an employee's response to sexual advances is later used to determine some other job benefit, such as compensation, and subsection (3) describes a hostile environment claim. Petitioner would limit claims of sexual harassment to those set forth in subsections (2) and (3), and eliminate altogether the form of sexual harassment set forth in subsection (1).

3. Consistent with the text of Title VII and the EEOC Guidelines, three courts of appeals have concluded that a supervisor's statement that a job benefit depends on the employee's submission to his sexual demands immediately alters the employee's terms or conditions of employment, and that a later adverse employment consequence is not a necessary element of such a claim The Second Circuit has stated that "once an employer conditions any terms of employment upon the employee's submitting to unwelcome sexual advances, a *quid pro quo* claim is made out." *Karibian* v. *Columbia Univ.*, 14 F.3d 773, 779, cert. denied, 512 U.S. 1213 (1994). That court further stated that "[t]he focus should be on the prohibited conduct, not the victim's reaction." *Ibid.* The Third Circuit has held that "a *quid pro quo* violation occurs at the time when an employee is told that his or her compensation, etc. is dependent upon submission to unwelcome sexual advances." *Robinson* v. *City of Pittsburgh*, 120 F.3d 1286, 1297 (1997). "The threat is sufficient to constitute 'discriminat[ion] * * * with respect to * * * compensation, terms, conditions, or privileges of employment because of * * * sex.'" *Ibid.* And, adopting the test proposed by Judge Reinhardt in *Nichols* v. *Frank*, 42 F.3d 503, 513 (1994), the Ninth Circuit has held that, in order to establish *quid pro quo* harassment, an employee must show that "an individual 'explicitly or implicitly condition[ed] a job, a job benefit, or the absence of a job detriment, upon an employee's acceptance of sexual conduct.'" *Heyne* v. *Caruso*, 69 F.3d 1475, 1478 (1995). Under that standard, "a supervisor's intertwining of a request for the performance of sexual favors with a discussion of actual or potential job benefits or detriments in a single conversation constitutes quid pro quo sexual harassment." *Nichols*, 42 F.3d at 513 (Reinhardt, J.).

4. Petitioner contends (Br. 17 & n.14.) that the act of conditioning a job benefit on submission to a sexual de-

mand cannot violate Title VII because, unless the employee submits or the supervisor imposes the threatened job consequence, there is no discrimination and no harm. For purposes of determining whether sexual harassment constitutes "discrimination" under Title VII, however, "[t]he critical issue is * * * whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." *Oncale*, slip op. 5. When a male supervisor informs a woman that she may advance in the company only if she submits to his sexual demand, and the supervisor does not establish such a condition on advancement for males, Title VII's test of discrimination is satisfied. *Ibid.* As this Court explained in *Oncale*, "the inference of discrimination is easy to draw in most male-female sexual harassment situations, because the challenged conduct typically involves explicit or implicit proposals of sexual activity; it is reasonable to assume those proposals would not have been made to someone of the same sex." *Ibid.*

Moreover, contrary to petitioner's view that an employee suffers no harm in such circumstances, requiring a women to choose between retaining her personal dignity and obtaining a job benefit can cause "real emotional strife." Pet. App. 19a (Flaum, J.). For example, suppose a supervisor tells a subordinate that she will not receive her normal yearly pay raise unless she submits to his sexual demands in the interim. An employee who does not submit to the supervisor's sexual demands and must live under such a threat for one year "may well undergo anxiety, distress, and loss of productivity regardless of whether the threat is carried out." *Ibid.* Petitioner errs in contending (Br. 16) that such harms may be discounted because they are not sufficiently "tangible." As the Court explained in *Meritor*, Congress intended "to strike at the entire spectrum of disparate treatment of men and women in employment," not just discrimination that could be characterized

as causing a "tangible" harm. 477 U.S. at 64. (internal quotation marks and citations omitted).

C. An Employer Is Vicariously Liable When A Supervisor Threatens An Employee With Adverse Job Consequences For A Failure To Submit To His Sexual Demands

1. Under common law agency principles, an employer is vicariously liable when it delegates authority to an agent and the agent misuses that authority and causes harm. When the agent is motivated in part by a desire to further the employer's interest, the employer is liable because the agent acts within the scope of his employment. Restatement (Second) of Agency § 219(1), at 481 (1958). When the agent is solely motivated by a desire to further his personal interests, the employer is vicariously liable because the agent "is aided in accomplishing the tort by the existence of the agency relation." *Id.* § 219(2), at 481. In either event, the employer is vicariously liable, because the employer's delegation of authority makes the injury suffered by the victim possible.

In keeping with that principle, courts of appeals have consistently held that, when a supervisor refuses to hire or discharges an employee on the basis of race or sex, that act is attributed to the employer, regardless of that employer's policies. *Long* v. *Eastfield College*, 88 F.3d 300, 306-307 (5th Cir. 1996); *Flowers* v. *Crouch-Walker Corp.*, 552 F.2d 1277, 1282 (7th Cir. 1977); *Anderson* v. *Methodist Evangelical Hosp., Inc.*, 464 F.2d 723, 725 (6th Cir. 1972). Because the discrimination is made possible by the employer's delegation of authority to the supervisor to hire and discharge employees, the employer is vicariously liable. See *Meritor*, 477 U.S. at 70-71 (noting that "courts have consistently held employers liable for the discriminatory discharges of employees by supervisory personnel, whether or not the employer knew, should have known, or approved of the supervisor's actions").

That same rationale explains the uniform holdings of courts of appeals that, when a supervisor imposes an adverse employment consequence on an employee because she refused to submit to a sexual advance, the employer is liable, without regard to whether the employer knew or should have known about the harassment, and without regard to whether the employer had a policy prohibiting such conduct. *Davis* v. *City of Sioux City*, 115 F.3d 1365, 1367 (8th Cir. 1997); *Nichols* v. *Frank*, 42 F.3d at 513-514; *Bouton* v. *BMW, Inc.*, 29 F.3d 103, 106-107 (3d Cir. 1994); *Karibian*, 14 F.3d at 777; *Sauers* v. *Salt Lake County*, 1 F.3d 1122, 1127 (10th Cir. 1993); *Kauffman* v. *Allied Signal, Inc.*, 970 F.2d 178, 185-186 (6th Cir.), cert. denied, 506 U.S. 1041 (1992); *Steele* v. *Offshore Shipbuilding, Inc.*, 867 F.2d 1311, 1316 (11th Cir. 1989). Because the supervisor would be unable to impose the adverse employment consequence without the authority and power furnished by the employer, the supervisor's conduct is properly imputed to the employer. Indeed, petitioner concedes as much. Br. 21.

The principle that an employer is vicariously liable when an agent abuses his delegated authority is also applicable when a supervisor uses his delegated authority to condition a job benefit on submission to a sexual demand. As Judge Flaum explained, "[m]aking a clear and unambiguous threat of an adverse job consequence is an exercise of the supervisor's delegated authority, just as actually inflicting the consequence invokes that authority," for "[i]ncluded in the supervisor's delegated power to hire, fire, promote, evaluate is the authority to threaten to use that power if certain conditions or requirements are not satisfied." Pet. App. 17a. For example, "no one would question that a supervisor was exercising the authority entrusted to him if he informed an employee that the employee would be fired if his work did not improve." *Ibid.* Thus, when a supervisor abuses that delegated authority by conditioning concrete job benefits or detriments on

compliance with sexual demands, the employer is vicariously liable. *Ibid.*

That is the same position that the United States and the EEOC advanced in *Meritor*. As the Court in *Meritor* noted, we argued there that "where a supervisor exercises the authority actually delegated to him by his employer, by making *or threatening to make* decisions affecting the employment status of his subordinates, such actions are properly imputed to the employer whose delegation of authority empowered the supervisor to undertake them." 477 U.S. at 70 (emphasis added).

2. Imposing vicarious liability on an employer when a supervisor uses his delegated authority to condition a job benefit on submission to a sexual demand is also consistent with the purposes of Title VII. One major purpose of Title VII is to provide a "spur" or a "catalyst" for an employer to eliminate discrimination from its workplace. *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 417-418 (1975). Holding an employer liable when a supervisor conditions a job benefit on submission to a sexual demand provides just such a catalyst. When an employer knows that it will be liable in such circumstances, the employer has a strong incentive to formulate the hiring, training, grievance, and disciplinary procedures that are best calculated to prevent such a misuse of authority from occurring or recurring. Cf. *American Soc. of M.E.'s* v. *Hydrolevel Corp.*, 456 U.S. 556, 572 (1982) ("the possibility of civil liability will inevitably be a powerful incentive" for an entity to "take systematic steps to make improper conduct on the part of all its agents unlikely").

One of the principal stated justifications for the common law rule imposing liability on employers for the acts of their agents without regard to employer fault is that it induces employers to intensify their efforts to prevent their agents from causing harm. Fleming James, Jr., *Vicarious Liability*, 28 Tul. L. Rev. 161, 168 (1954). That

justification is particularly persuasive here. Indeed, this Court has recognized that one important purpose of monetary relief under Title VII is to give managers an "incentive to take preventive measures to ward off discriminatory conduct by subordinates *before* it occurs." *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 283 n.35 (1994).

A second major purpose of Title VII is to compensate the victims of discrimination. *Albemarle*, 422 U.S. at 418. With the enactment of the Civil Rights Act of 1991, which authorizes compensatory damages for intentional violations of the Act, 42 U.S.C. 1981a(b), that purpose has assumed increased significance in cases of sexual harassment. The 1991 Act evidences Congress's view that the victims of sexual harassment should be compensated "for the terrible injury to their careers, to their mental, physical, and emotional health, to their self-respect and dignity, and for other consequential harms." 137 Cong. Rec. 30,661 (1991) (section-by-section analysis of Rep. Edwards). Holding an employer liable when a supervisor conditions a job benefit on submission to a sexual demand furthers that compensatory goal as well. As previously discussed, when a supervisor engages in such conduct, it can cause the very harms to personal dignity and emotional health that the 1991 Act seeks to compensate.

One of the reasons the common law holds employers liable for the wrongdoing of agents who abuse their authority is to ensure that the victims of wrongful conduct do not go uncompensated. James, *supra*, 28 Tul. L. Rev. at 169-170; *Prosser and Keeton on the Law of Torts* 500-501 (W. Page Keeton ed., 5th ed. 1984). The common law approach rests on the view that, because the employer has sought to profit through the use of agents, the employer, rather than the innocent victim, should bear the costs when those agents abuse their delegated authority and cause injury. *Ibid.* That common law rationale is fully applicable here. Because supervisors are not subject to personal liability

under Title VII, unless petitioner is vicariously liable for Slowik's alleged conduct, even if respondent proves that she has been subjected to employment-related sexual harassment, she will have no federal remedy at all. The district court noted the disturbing quality of that result:

> Needless to say, the facts of this case are unfortunate because no person should have to endure the objectification and humiliation that [respondent] was allegedly forced to endure at the hands of Slowik * * * The outcome is unfortunate in the sense that Slowik, if [respondent's] allegations are true, is able to walk away from this episode unscathed and [respondent] unable to recover.

Pet. App. 285a-286a. That unfortunate result may be avoided through application of ordinary principles of vicarious liability.

3. We have argued in our brief in *Faragher* v. *City of Boca Raton*, No. 97-282 (argued Mar. 25, 1998), that the question whether an employer is liable for a hostile work environment involves a fact-intensive inquiry into whether, in light of the scope of the delegation of authority, the employer's anti-harassment policies, and the conduct of the supervisor, the subordinate reasonably fears adverse employment consequences if she resists or complains. 97-282 U.S. Amicus Br. at 17-24. That fact-intensive inquiry is necessary in order to determine whether the supervisor's delegated powers made the creation of a hostile work environment possible or whether the supervisor instead simply took advantage of his proximity to the subordinate in the same way that a co-worker could. There is no need for that same fact-intensive inquiry in the present context. When a supervisor states through an explicit or veiled threat that, in order to obtain a job benefit, a subordinate must submit to his sexual demands, it is clear that the delegation of power from the employer

to the supervisor has made the imposition of a discriminatory term of employment possible.

Imposing vicarious liability in such circumstances is supported by an additional consideration as well. Although it is not always possible to establish clear-cut lines separating legitimate sexual banter and rude behavior from conduct that creates a hostile environment, there are no such line-drawing problems in the present context. There is no legitimate reason for a supervisor to demand sexual favors in return for job benefits; nor could such a demand be viewed as only mildly rude or obnoxious. Such threats are per se illegitimate and indefensible. Employers should therefore have no difficulty effectively communicating to their supervisors that conditioning job benefits on submission to sexual demands will not be tolerated, and employers may fairly be held liable for any deviation from that clearly defined norm. Pet. App. 21a-22a (Flaum, J.).

4. Finally, petitioner errs in contending (Br. 21-22) that vicarious liability should be limited to so-called company acts, such as hiring, firing, and promotions. The theory underlying that contention is that company acts based on failure to comply with sexual demands are more susceptible than other forms of sexual harassment—whether extortionate or otherwise—to detection and prevention by an employer, through a process of review. Pet. App. 51a-53a (Posner, C.J.). That theory rests on a mistaken factual premise, and results in drawing a line between forms of harassment that are not different in any relevant way. The factual premise is mistaken because, when a supervisor's hiring, promotion, pay, or termination decision is based on failure to comply with sexual demands, the supervisor will ordinarily explain the decision in ways that make it appear legitimate. The extortionate demand will be equally difficult or easy for management to uncover whether the employee complies with it, refuses and suffers anxiety over the likely consequences, or refuses and is

fired. Moreover, the extortionate demand may be easier or harder to detect than the creation of a hostile environment by other forms of harassing conduct continuing over time. Ease of detection depends on the facts of the particular case, and not on the general form of harassment.

Vicarious liability is appropriate for "company acts" not because they make detection of wrongdoing easier, but for two other reasons. First, in the case of a company act there is an unambiguous invocation of company power, unlike some forms of harassment, which may present a question about whether the supervisor was invoking company power or merely taking advantage of proximity to engage in harassing behavior. Second, there is no ambiguity about the wrongfulness of firing or otherwise imposing adverse job consequences on a person for failure to comply with a sexual demand, and thus it is relatively easy for management to communicate a clear prohibition, in contrast to other forms of hostile environment discrimination which may raise questions about the severity and even the unwelcomeness of the conduct. Both of those factors, however, are present in any case of an extortionate demand for sexual favors, whether the employee complies, refuses and suffers anxiety about the likely outcome, or refuses and is fired. The extortionate demand is an unambiguous invocation of the employer's authority, no matter which of the three outcomes occurs. Likewise, the employer's ability to communicate a clear prohibition on such extortionate demands does not depend on which of the three outcomes occurs. There is simply no reason to distinguish among those outcomes in imposing liability on an employer for a supervisor's act of threatening an employee with adverse job consequences for failure to comply with a sexual demand.

D. Respondent Presented Sufficient Evidence To Resist Petitioner's Motion For Summary Judgment

For the reasons discussed above, a plaintiff can establish that there has been discrimination in a term or condition of employment for which the employer is liable by showing that a supervisor conditioned a job benefit on submission to his sexual demands. In this case, respondent presented evidence from which a reasonable jury could make such a finding. In particular, respondent presented evidence that Theodore Slowik, a company vice president, told her that he could make respondent's life hard or easy. Respondent also presented evidence that Slowik told her that he would not give her assignments unless she told him what she was wearing. And respondent introduced evidence that Slowik confirmed that he was hesitant to promote her because she was not "loose enough" for him. Pet. App. 27a. From those statements, a reasonable jury could conclude that Slowik was conditioning respondent's advancement in the company on respondent's catering to his sexual desires.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

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Petitioner,

v.

KIMBERLY B. ELLERTH,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

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BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

The Equal Employment Advisory Council (EEAC) respectfully submits this brief as *amicus curiae*.[1] Letters of consent from all parties have been filed with the Clerk of the Court. The brief urges this Court to reverse the decision below, and thus supports the position of Petitioner, Burlington Industries, Inc., before this Court.

INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976

[1] Counsel for EEAC authored the brief in its entirety. No person or entity, other than EEAC, its members, or its counsel, made a monetary contribution to the preparation or submission of the brief.

to promote sound approaches to the elimination of employment discrimination. Its members include over 300 of the nation's largest private sector corporations. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

All of EEAC's members are employers subject to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII"), as well as other equal employment statutes and regulations. As employers, and as potential respondents to employment discrimination charges, EEAC's members have a substantial interest in the legal standards for determining when workplace conduct constitutes actionable "sexual harassment" under Title VII.

EEAC's members are committed to maintaining workplaces that are free from discrimination, including sexual harassment. Likewise, EEAC's member companies are well aware that discrimination, including sexual harassment, is unlawful. EEAC's member companies long ago recognized that workplace discrimination, including sexual harassment, not only is against the law, but also is bad business, causing employees to be less productive, less satisfied with their jobs, and ultimately less likely to stay with the company.

Accordingly, EEAC's members have expended substantial resources and significant efforts to combat workplace sexual harassment. They have adopted policies expressing their commitment to the right of all employees to be free from sexual harassment in the workplace and categorically forbidding supervisors and employees from engaging in sexually harassing conduct. They have communicated

those policies to all employees at new employee orientation and other appropriate opportunities. They have publicized those policies in employee manuals and hand-delivered and posted notices. They have conducted frequent and repeated seminars, training sessions, and briefings to teach supervisors and employees to recognize and halt harassment in the workplace.

In addition, EEAC's members have implemented formal anti-harassment procedures that encourage witnesses as well as victims to report sexual harassment to management. These procedures call for rapid, thorough investigation and prompt, effective remedial action where warranted, including discipline and, where appropriate, discharge of offenders. Moreover, EEAC members have taken steps to ensure that these procedures are accessible to employees and that employees are aware of both their purpose and their effect.

Thus, the issue before the Court is extremely important to the nationwide constituency that EEAC represents. The court below held that an employer can be held strictly liable for sex discrimination in violation of Title VII on a "*quid pro quo*" theory of sexual harassment based solely on a supervisor's sexual advances which the plaintiff refused, even though her refusal did not result in any tangible effect on her compensation, terms or conditions of employment. Under this view, an employer could be held liable for a supervisor's sexual advances despite its efforts to prevent such behavior, in the absence of any tangible harm, without any showing that the conduct reached the level of severity and pervasiveness established by this Court in *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993), for a Title VII violation resulting from a sexually hostile environment.

Because of its interest in the application of the nation's fair employment laws, EEAC has filed briefs as *amicus curiae* in numerous cases before this Court, the United States Courts of Appeals, and various state supreme

courts. As part of this activity, EEAC participated as *amicus curiae* in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986), and *Harris*, as well as two cases currently pending in this Court addressing sexual harassment issues, *Oncale v. Sundowner Offshore Services, Inc.*, 83 F.3d 118 (5th Cir. 1996), *cert. granted*, 117 S. Ct. 2430 (1997) (same-sex harassment); *Faragher v. City of Boca Raton*, 111 F.3d 1530 (11th Cir.), *cert. granted*, 118 S. Ct. 438 (1997) (employer liability for environmental harassment). Thus, EEAC has an interest in, and a familiarity with, the issues and the policy concerns involved in this case.

EEAC seeks to assist the Court by highlighting the impact its decision in this case may have beyond the immediate concerns of the parties to the case. Accordingly, this brief brings to the attention of the Court relevant matter that has not already been brought to its attention by the parties. Because of its experience in these matters, EEAC is well situated to brief the Court on the relevant concerns of the business community and the significance of this case to employers.

STATEMENT OF THE CASE

Kimberly Ellerth was hired by Burlington Industries as a merchandising assistant in the House Mattress Ticking Division in March 1993. Pet. App. 243a-244a. In March 1994, she was promoted to a sales representative position in the same division. Pet. App. 244a. In each job, her direct supervisor reported to one Theodore Slowik. *Id.*

In May 1994, Ellerth's supervisor and the Customer Service Manager received some complaints about Ellerth and sent her a memorandum about them. Pet. App. 252a. Ellerth quit a week later. *Id.* In June, she sent her former supervisor a letter saying that she had quit because Slowik was sexually harassing her. *Id.*

According to Ellerth, the harassment began at her preemployment interview, when Slowik asked probing questions about her plans to have a family and stared at her in a sexual way. Pet. App. 244a-245a. During her employment, she spoke to Slowik approximately once a week and saw him for a day or two each month or two. Pet. App. 244a. She contends that on numerous occasions, Slowik told off-color jokes in her presence, stared at her, and made various personal remarks. Pet. App. 245a-249a. On one occasion in the summer of 1993, Ellerth says, Slowik said, "You know, Kim, I could make your life very hard or very easy at Burlington." Pet. App. 247a. Ellerth also alleges that, during her promotional interview, Slowik rubbed her knee under the table. Pet. App. 249a.

Ellerth knew that Burlington had a policy against sexual harassment; she had read the policy in her employee handbook. Pet. App. 251a. She never told anyone in authority at Burlington about Slowik's conduct during her employment, although she did complain to several coworkers, a customer, and her husband and parents. Pet. App. 251a.

Ellerth sued Burlington for sexual harassment under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* The district court granted Burlington's motion for summary judgment. Pet. App. 287a. The district court ruled that the generally accepted "negligence" standard applicable to hostile environment cases, rather than the "strict liability" standard often applied to *quid pro quo* cases, should be used in cases involving a "hostile work environment context wherein the hostile environment was created, in part, by *quid pro quo* insinuations. . . ." Pet. App. 284a. Applying the "negligence" standard, the district court concluded that the absence of notice to Burlington precluded liability. Pet. App. 284a.

Ellerth appealed. In January 1997, a panel of the Seventh Circuit reversed the district court's decision, treating the case as one primarily involving *quid pro quo* harassment. Pet. App. 209a. The Seventh Circuit then granted rehearing *en banc* and vacated the panel decision. Pet. App. 240a.

The *en banc* court combined the case with a similar case then pending before another panel, *Jansen v. Packaging Corp. of America*. Pet. App. 2a. A majority of the *en banc* court concluded that "[1] the standard for employer liability in cases of hostile-environment sexual harassment by a supervisory employee is negligence, not strict liability; and that [2] liability for quid pro quo harassment is strict even if the supervisor's threat does not result in a company act." Pet. App. 7a. Accordingly, the *en banc* court affirmed the district court's judgment in favor of Burlington on the hostile environment issue, but reversed and remanded on the *quid pro quo* issue. *Id.*

Burlington petitioned this Court for a writ of *certiorari*, which was granted on January 23.

SUMMARY OF ARGUMENT

The court below erred in holding that a *quid pro quo* claim of sexual harassment can be maintained even though the plaintiff neither submitted to sexual advances nor suffered a tangible job detriment. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 *et seq.*, makes it an unlawful employment practice for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's . . . sex . . . ." Under *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986), and *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993), sex-based workplace conduct violates Title VII if it meets established standards of severity or pervasiveness. Conduct that does not meet those standards is actionable only if it otherwise violates Title VII.

Quid pro quo harassment by definition requires that a tangible job detriment or benefit be conditioned on the grant or denial of sexual favors. If either the *quid* or the *quo* is missing, sex-based conduct is not actionable

unless it is sufficiently severe or pervasive to constitute a hostile environment.

Accordingly, contrary to the decision below, a mere threat of a job detriment in exchange for withholding sexual favors cannot constitute *quid pro quo* harassment. While frequent or protracted demands may indeed affect the "terms and conditions" of employment, they do so only because they create a hostile environment, not because they are a *quid pro quo*.

In either a hostile environment or *quid pro quo* case, an employer should be shielded from liability where the plaintiff fails to take advantage of a well-communicated express policy against sexual harassment and an adequate procedure for resolving claims. This Court ruled in *Meritor* that employers are not always automatically liable for sexual harassment by their employees. Indeed, the Court strongly suggested that a well disseminated, express policy prohibiting sexual harassment, coupled with a procedure that encouraged victims to come forward, might obviate employer liability where the victim failed to complain. Strong public policy supports encouraging employers to adopt such policies and procedures. For the same reasons, employers should not be held liable if they act promptly and appropriately upon receiving a sexual harassment complaint, including restoration of any benefits lost as the results of a *quid pro quo*.

ARGUMENT

I. LIABILITY FOR A TITLE VII VIOLATION FOR SEXUAL HARASSMENT UNDER THE *"QUID PRO QUO"* THEORY REQUIRES BOTH A *"QUID"* AND A *"QUO"*

A. Title VII Prohibits Discrimination in the Fact of Employment and in Compensation, Terms, Conditions or Privileges of Employment Because of a Protected Characteristic

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, makes it an unlawful employment practice for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin . . . ." 42 U.S.C. § 2000e-2(a)(1). Accordingly, under this Court's decisions, the plaintiff in a Title VII disparate treatment case at all times retains the burden of proving to the trier of fact that an employment action was taken for a reason prohibited under the statute. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

While "the burden of establishing a prima facie case of disparate treatment is not onerous," *id.*, the occurrence of an adverse employment action is a necessary element. *Cf. McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) ("[T]he complainant . . . must carry the initial burden by showing . . . (iii) that, despite his qualifications, he was rejected . . . ."). *See also St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 523-24 (1993) ("Title VII does not award damages against employers who cannot prove a nondiscriminatory reason for adverse employment action, but only against employers who are proven to have taken *adverse employment action* by reason of (in the context of the present case) race.") (emphasis added); *International Bhd. of Teamsters v. United States*, 431

U.S. 324, 358 (1977) ("The importance of *McDonnell Douglas* lies, not in its specification of the discrete elements of proof there required, but in its recognition of the general principle that any Title VII plaintiff must carry the initial burden of offering evidence adequate to create an inference that *an employment decision* was based on a discriminatory criterion illegal under the Act.") (emphasis added).

Thus, in order to make out a *prima facie* case of disparate treatment under Title VII, a plaintiff must prove as a necessary element that an unlawful employment practice occurred, *e.g.*, that the employer failed or refused to hire, discharged, or otherwise discriminated with respect to compensation, terms, conditions or privileges of employment, because of a protected characteristic.

B. Workplace Sexual Conduct Violates Title VII Only If It Constitutes Discrimination in the Fact of Employment or in Compensation, Terms, Conditions or Privileges

1. *Environmental Harassment Is Actionable Only If It Meets Established Standards of Severity or Pervasiveness Under* Meritor *and* Harris

In *Meritor Savings Bank, FSB v. Vinson*, this Court concluded that "a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment." *Meritor*, 477 U.S. at 66. Quoting guidelines issued in 1980 by the Equal Employment Opportunity Commission, the Court noted that "the Guidelines first describe the kinds of workplace conduct that may be actionable under Title VII. These include '[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature.'" *Id.* at 65 (quoting 29 C.F.R. § 1604.11 (a) (1985)). Further, the Court continued,

> the Guidelines provide that such sexual misconduct constitutes prohibited "sexual harassment," *whether*

> *or not it is directly linked to the grant or denial of an economic quid pro quo*, where "such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment."

Id. (emphasis added) (quoting 29 C.F.R. 1604.11(a)(3)). The Court then agreed with the Guidelines' interpretation that "hostile environment" harassment was actionable. *Id.* at 66.

In so doing, the Court noted that "not all workplace conduct that may be described as 'harassment' affects a 'term, condition or privilege' of employment within the meaning of Title VII. . . ." *Id.* at 67. Instead, this Court held that "[f]or sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" *Id.*

In *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993), the Court elaborated on the principle enunciated in *Meritor*, holding that a plaintiff need not show "tangible psychological injury" in order to establish a case of environmental harassment. *Id.* at 21. At the same time, the Court reinforced its holding in *Meritor* that not all offensive conduct is actionable. "Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview." *Id.*

Accordingly, under *Meritor* and *Harris*, workplace sexual conduct that is not directly linked to the grant or denial of an economic *quid pro quo* may still be actionable under the "hostile environment" theory—but only if it rises to the level established by this Court.

2. *By Definition, Sexual Harassment Is* Quid Pro Quo *Only If a Tangible Job Detriment or Benefit Is Conditioned on Sexual Favors*

A *quid pro quo* claim arises when sexual favors are demanded as the price for granting a job benefit or refraining from inflicting a job detriment. *Henson v. City of Dundee*, 682 F.2d 897, 908 (11th Cir. 1982) ("An employer may not require sexual consideration from an employee as a *quid pro quo* for job benefits."). "As the name suggests, '[t]he gravamen of a *quid pro quo* claim is that a tangible job benefit or privilege is conditioned on an employee's submission to sexual black-mail and that adverse consequences follow from the employee's refusal.'" *Gary v. Long*, 59 F.3d 1391, 1395 (D.C. Cir. 1995) (quoting *Carrero v. New York City Hous. Auth.*, 890 F.2d 569, 579 (2d Cir. 1989)). "*Quid pro quo* sexual harassment is anchored in an employer's sexually discriminatory behavior which compels an employee to elect between acceding to sexual demands and forfeiting job benefits, continued employment or promotion, or otherwise suffering tangible job detriments." *Highlander v. K.F.C. Nat'l Management Co.*, 805 F.2d 644, 648 (6th Cir. 1986). *See also Reinhold v. Virginia*, No. 96-2816, 1998 WL 45247, at *14 (4th Cir. Feb. 6, 1998) ("Quid pro quo sexual harassment occurs when an employer conditions, explicitly or implicitly, the receipt of a job benefit or a tangible job detriment on the employee's acceptance or rejection of sexual advances.").

Accordingly, both the "*quid*" and the "*quo*" are necessary elements of a *prima facie* case for a *quid pro quo* claim. "The acceptance or rejection of the harassment . . . must be an express or implied condition to the receipt of a job benefit or the cause of a tangible job detriment in order to create liability . . . ." *Henson v. City of Dundee*, 682 F.2d at 909; *Spencer v. General Elec. Co.*, 894 F.2d 651, 658 (4th Cir. 1990) (same language) (citing *Henson*); *Jones v. Flagship Int'l*, 793 F.2d 714, 722 (5th Cir.

1986), *cert. denied*, 479 U.S. 1065 (1987) (same language) (citing *Henson*); *Highlander v. K.F.C. National Management Co.*, 805 F.2d 644, 648 (6th Cir. 1986) (citing *Henson*); *Hicks v. Gates Rubber Co.*, 833 F.2d 1406 (10th Cir. 1987). *See also Cram v. Lamson & Sessions Co.*, 49 F.3d 466, 473 (8th Cir. 1995) (one element of *prima facie* case is that "her submission to the unwelcome advances was an express or implied condition for receiving job benefits or her refusal to submit resulted in a tangible job detriment").[2]

Meritor stands for the proposition that a tangible economic detriment is not always essential to a finding of unlawful sexual harassment, because sex-based conduct creating a hostile or abusive work environment is actionable as well. Absent a hostile or abusive work environment, sexual harassment meets Title VII's requirement of "discriminat[ion] against any individual with respect to his compensation, terms, conditions or privileges of employment" only if such discrimination actually occurs.

Accordingly, where either the "*quid*" or the "*quo*" is missing, the case cannot proceed. *E.g., Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1414 (10th Cir. 1987) (affirming summary judgment for employer where there was no "suggestion to [plaintiff]—either explicitly or implicitly—that her employment was conditioned on granting sexual favors . . ." and that "adverse job consequences . . . were due solely to her inadequate job performance"); *Farley v. American Cast Iron Pipe Co.*, 115 F.3d 1548 (11th Cir. 1987) (finding no viable *quid pro quo* cause

[2] Absent direct evidence that a tangible job detriment occurred because of a refusal to grant sexual favors, where a *quid pro quo* plaintiff *does* establish a *prima facie* case, the burden of persuasion shifts to the defendant to articulate a legitimate, nondiscriminatory business reason for the challenged employment action. *Spencer v. General Elec. Co.*, 894 F.2d 651, 659 (4th Cir. 1990). *Cf. Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

of action where evidence was lacking that supervisor demanded sexual favors in exchange for a tangible job benefit); *Gary v. Long*, 59 F.3d 1391 (D.C. Cir. 1995) (affirming dismissal of claim because although threat of adverse job consequences was made, it was not carried out); *cf. Chamberlain v. 101 Realty, Inc.*, 915 F.2d 777, 785 (1st Cir. 1990) (permitting claim to proceed where evidence showed that plaintiff was terminated for "stonewalling" supervisor's advances).

This view is consistent with the EEOC Guidelines, which describe the type of sexual harassment that is linked to a *quid pro quo* as occurring when "(1) *submission* to such conduct is *made* either explicitly or implicitly a term or condition of an individual's employment, [or] (2) *submission* to *or rejection* of such conduct by an individual is *used* as the basis for employment decisions affecting such individual. . . ." 29 C.F.R. § 1604.11(a) (emphasis added).

3. *A Mere Threat to Condition a Job Benefit or Detriment on the Grant or Denial of Sexual Favors Is Not* Quid Pro Quo *Harassment If It Is Unsuccessful*

The "classic" *quid pro quo* case violates Title VII because the victim's rejection of sexual advances actually results in the employer's failing to hire or terminating her, or imposing some other adverse effect on the victim's "compensation, terms, conditions or privileges" of employment. Where either necessary element of a *quid pro quo* claim is missing, the plaintiff fails to establish a *prima facie* case of a Title VII violation.[3]

Thus, an unfulfilled threat of adverse consequences is not sufficient to support a *quid pro quo* claim. "[I]t

[3] Of course, if there was no demand for sexual favors, there can be no claim of discrimination "because of . . . sex" as Title VII requires.

takes more than saber rattling alone to impose *quid pro quo* liability on an employer; the supervisor must have wielded the authority entrusted to him to subject the victim to adverse job consequences as a result of her refusal to submit to unwelcome sexual advances." *Gary v. Long*, 59 F.3d 1391, 1396 (D.C. Cir. 1995).

The adverse effect need not be termination—although termination of an employee for refusal to submit to sexual advances certainly would suffice. The *quid pro quo* may occur "by altering the conditions and privileges of [the victim's] employment in tangible and detrimental ways." *Reinhold*, 1998 WL 45247, at *15 (imposing greater work assignments and withholding opportunity to attend a professional conference). *See also Saulpaugh v. Monroe Community Hosp.*, 4 F.3d 134 (2d Cir. 1993), *cert. denied*, 510 U.S. 1164 (1994) (depriving victim of a "fair evaluation of her work" was sufficient "deprivation of a job benefit" for *quid pro quo* purposes); *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982) (victim entitled to new trial on *quid pro quo* claim where trial judge failed to consider evidence that her rejection of sexual advances led to denial of opportunity to attend police academy).[4]

Likewise, actionable *quid pro quo* harassment may occur when the victim *submits* to sexual advances to avoid the loss of a tangible job benefit or the imposition of a tangible job detriment. *Karibian v. Columbia Univ.*, 14 F.3d 773, 779 (2d Cir.), *cert. denied*, 114 S. Ct. 2963 (1994).[5] Here, the *quid pro quo* requirement is fulfilled

[4] Indeed, it is arguable that the required tangible job detriment need not be economic in nature, as the Sixth Circuit speculated but did not decide in *Kauffman v. Allied Signal, Inc.*, 970 F.2d 178, 187 (6th Cir.), *cert. denied*, 506 U.S. 1041 (1992). In that circumstance, however, the Sixth Circuit observed, "there may be a *de minimis* exception for temporary actions, such as in this case, where further remedial action is moot and no economic loss occurred." *Id.*

[5] Where an alleged victim participates in sexual behavior, the issue then becomes, not whether the participation was "voluntary," but whether it was "unwelcome." *Meritor*, 477 U.S. at 68. Where a *quid pro quo* situation is alleged, part of this inquiry must be whether the victim reasonably believed that adverse action would occur if she refused, including whether or not the aggressor actually had the ability to impose a tangible job detriment.

where the victim reasonably believes that a tangible job detriment will be imposed if she does not submit, and submits to avoid the detriment.

But there has to be one or the other. Either the victim refuses—and suffers a tangible job detriment—or the victim submits—and as a result avoids the detriment. *Karibian*, 14 F.3d at 779 ("once an employer conditions any terms of employment upon the employee's submitting to unwelcome sexual advances, a *quid pro quo* claim is made out, regardless of whether the employee (a) rejects the advances *and suffers the consequences*, or (b) submits to the advances *in order to avoid the consequences*.") (emphasis added).

If the purported victim has been the target of sexual advances but the tangible job detriment or benefit is missing, she may have a "hostile environment" claim if the conduct is "severe or pervasive enough to create an objectively hostile or abusive work environment" as required by *Harris v. Forklift Systems, Inc.*, 510 U.S. at 21. Of course, unwelcome sexual advances are offensive, and more so when the aggressor purports to link submission to a job detriment or benefit. But it is important not to "confuse[] tangible job detriment with distress or psychological harm, an intangible detriment." *Jones v. Flagship Int'l*, 793 F.2d 714, 721 (5th Cir. 1986). "[T]he absence of [a tangible job] detriment requires a commensurately higher showing that the sexually harassing conduct was pervasive and destructive of the working environment." *Id.* at 720.

It is here that the court below erred. According to Judge Flaum, "a clear and serious *quid pro quo* threat

alters the 'terms and conditions' of employment in such a way as to violate Title VII and therefore can constitute an actionable claim even if the threat remains unfulfilled." Pet. App. 17a. Indeed it may, but only when the threat is "serious" enough to create a hostile working environment. It is precisely because the threat is serious that it alters the "terms and conditions" of employment. Indeed, by Judge Flaum's own words, were the threat not "serious" it would not constitute a violation.

While concluding that a "company act" is necessary to a *quid pro quo* claim, Judge Posner suggested that his idea "is, for sure, not the orthodox approach." Pet. App. 52a-53a. We respectfully submit that Judge Posner is too self-critical. Far from having a "mere footing in the case law" and "the curse of novelty," Judge Posner's conclusion is well-founded in discrimination law.

Indeed, the Third is the only circuit to have said squarely that a "threat" is sufficient. *Robinson v. Pittsburgh*, 120 F.3d 1286, 1297 (3d Cir. 1997). This statement, however, rightfully is *dicta*, since the only actual finding of *quid pro quo* in *Robinson* was that the plaintiff was denied a transfer because she refused sexual advances. *Id.* at 1298.[6]

For the foregoing reasons, the absence of either the "*quid*" or the "*quo*" prevents a plaintiff from establishing a *prima facie* case of sexual harassment under the *quid pro quo* theory. In the instant case, both are absent, since Ellerth neither submitted to Slowik's advances nor suffered a tangible job detriment as a result.

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[6] Although the Third Circuit cited the Second Circuit's decision in *Karibian* in support of its conclusion that a threat was sufficient, a careful reading of *Karibian* shows that it does not. The language quoted—that the employer is liable whether the employee submits or not—is tied inextricably to the Second Circuit's ruling, discussed above, that employees who *submit* can bring a *quid pro quo* claim in appropriate circumstances, and not just those who refuse. *Karibian*, 14 F.3d at 778.

II. AN EMPLOYER SHOULD BE SHIELDED FROM LIABILITY WHERE THE PLAINTIFF FAILS TO TAKE ADVANTAGE OF A WELL COMMUNICATED, EXPRESS POLICY AGAINST SEXUAL HARASSMENT AND AN ADEQUATE PROCEDURE FOR RESOLVING CLAIMS, OR WHERE THE EMPLOYER HAS TAKEN PROMPT AND APPROPRIATE ACTION

A. This Court Held in *Meritor* That Employers Are Not Always Automatically Liable for Sexual Harassment by Their Supervisors, But Required Instead That Courts Apply Common Law Agency Principles

This Court has refused to hold employers automatically liable for sexual harassment by their supervisors under all circumstances. *Meritor*, 477 U.S. at 72. In *Meritor*, both parties sought to have the Court establish a standard for employer liability. The plaintiff argued for strict liability, contending that Title VII's definition of "employer" as including an "agent" requires employer liability whenever a supervisory employee is involved. 477 U.S. at 70. The employer, on the contrary, contended that it could not be held liable for a supervisor's misconduct unless it had notice and failed to take action. *Id.*

While the Court "decline[d] the parties' invitation to issue a definitive rule," 477 U.S. at 72, it did reject an automatic liability standard, holding that, "the Court of Appeals erred in concluding that employers are always automatically liable for sexual harassment by their supervisors." *Id.*

Instead, the Court said:

> [W]e agree with the EEOC that Congress wanted courts to look to agency principles for guidance in this area. While such common-law principles may not be transferable in all their particulars to Title VII, Congress' decision to define "employer" to include any "agent" of an employer, 42 U.S.C.

> § 2000e(b), surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible. . . . See generally Restatement (Second) of Agency §§ 219-237 (1958).

Id.

The sections of the Restatement to which the Court referred, which address the liability of a master for torts committed by a servant, do not hold an employer responsible for every act of every employee. The relevant portions of § 219(2) explain generally that a master is not liable for actions outside the scope of employment unless the employer was negligent or reckless, or the servant acted with apparent authority or was aided in the accomplishment of the tort by the existence of the agency relation.[7]

Under any of the agency principles that are adaptable for use in sexual harassment cases, the existence of an express, well communicated policy against discrimination, coupled with an accessible complaint procedure that leads to prompt and effective action where harassment is found, shields the employer from liability.

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[7] Section 219 provides:

> (1) A master is subject to liability for the torts of his servants committed while acting in the scope of their employment.
>
> (2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:
>
> (a) the master intended the conduct or the consequences, or
>
> (b) the master was negligent or reckless, or
>
> (c) the conduct violated a non-delegable duty of the master, or
>
> (d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.

Restatement (Second) of Agency § 219 (1958).

B. Sexual Harassment Is Virtually Always Outside of the Scope of a Supervisor's Employment

A supervisor generally acts within the scope of employment when he or she hires, fires, disciplines, promotes, or directs the day-to-day work of the employees he or she supervises.[8] Under agency principles, sexual harassment is not within the scope of employment.

According to the Restatement, "[c]onduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master." Restatement (Second) of Agency § 228(2) (1958). In Policy Guidance issued by the Equal Employment Opportunity Commission, the federal agency having enforcement authority over Title VII, the agency noted that "[i]t will rarely be the case that an employer will have authorized a supervisor to engage in sexual harassment." *Policy Guidance on Current Issues of Sexual Harassment*, No. N-915-050, *reprinted in*, *EEOC Compliance Manual* (BNA), N:4031, 4055 (Mar. 19, 1990) ("EEOC Policy Guidance").

Similarly, sexual harassment cannot be said to "serve the purposes" of the employer; precisely the opposite is true. Sexual harassment—or any form of harassment, for

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[8] The Restatement defines "scope of employment" as follows:

> Conduct of a servant is within the scope of employment if, but only if:
>
> (a) it is of the kind he is employed to perform;
>
> (b) it occurs substantially within the authorized time and space limits;
>
> (c) it is actuated, at least in part, by a purpose to serve the master; and
>
> (d) if force is intentionally used by the servant against another, the use of force is not unexpectable by the master.

Restatement (Second) of Agency § 228(1) (1958).

that matter—is likely to be distracting, demoralizing, and ultimately debilitating to an employee's productivity. An employee who has to "run a gauntlet of sexual abuse," *Henson v. City of Dundee*, 682 F.2d 897, 902 (11th Cir. 1982) (quoted in *Meritor*, 477 U.S. at 67), likely will have difficulty focusing on the work for which she is paid. Thus, if anything, sexual harassment is antithetical to the purposes of the employer.

Where there is any doubt, the fact that an employer has specifically forbidden an act is, under traditional agency principles, evidence that the act is outside the scope of employment.[9] An example offered by the Restatement explains, "where a person employs another to make collections, a specific direction by such employer that servants shall not use force in seeking to collect debts is a factor tending to show that an assault made by the servant to enforce collection is not within the scope of employment." Restatement (Second) of Agency § 230 cmt. c. (1958). Thus, the existence of a company policy forbidding sexual harassment is evidence that conditioning sexual favors on tangible job benefits or detriments is not within the scope of a supervisor's employment.

C. A Well Communicated Policy Prohibiting Sexual Harassment, Coupled With an Effective Remedial Procedure, Precludes Employer Liability Under Both "Apparent Authority" and "Negligence" Theories Where the Victim Fails to Use Them

An employer cannot be held responsible for *quid pro quo* harassment under either an "apparent authority"

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[9] Restatement (Second) of Agency § 230 cmt. c. (1958) states in pertinent part:

> Prohibition to do any acts except those of a certain class may indicate that the scope of employment extends only to acts of that class. Furthermore, the prohibition by the employer may be a factor in determining whether or not, in an otherwise doubtful case, the act of the employee is incidental to the employment; it accentuates the limits of the servant's permissible action and hence makes it more easy to find that the prohibited act is entirely beyond the scope of employment.

theory or on negligence grounds where the employer has an express policy forbidding harassment. As the EEOC Policy Guidance states:

> an employer can divest its supervisors of . . . apparent authority by implementing a strong policy against sexual harassment and maintaining an effective complaint procedure. When employees know that recourse is available, they cannot reasonably believe that a harassing work environment is authorized or condoned by the employer. If an employee failed to use an effective, available complaint procedure, the employer may be able to prove the absence of apparent authority and thus the lack of an agency relationship, unless liability attaches under some other theory.

EEOC Policy Guidance at N:4056 (footnotes omitted).

Likewise, an employer cannot be held to have acted negligently where it has put in place an accessible procedure for reporting sexual harassment and the victim has failed to use it. *E.g.*, *Perry v. Harris Chernin, Inc.*, 126 F.3d 1010 (7th Cir. 1997) (employer who published policies and pamphlets against sexual harassment, encouraging employees to come forward, and addressed the issue at employee meetings, not liable for conduct occurring before employee complained).

While this analysis customarily is used in evaluating "hostile environment" cases, it is equally applicable to *quid pro quo* cases. Where an employer has established and communicated an express policy forbidding sexual harassment, an employee cannot reasonably believe that a supervisor has the authority to condition favorable or unfavorable employment actions on the granting or withholding of sexual favors.

This Court in *Meritor* rejected the view that "the *mere existence* of a grievance procedure and *a* policy against discrimination, coupled with [a victim's] failure to invoke that procedure, must insulate [an employer] from lia-

bility." *Meritor*, 477 U.S. at 72. The Court criticized the employer's policy in *Meritor* on several grounds: that the policy merely addressed discrimination generally and did not expressly address sexual harassment, and that the complaint procedure required a victim to complain first to her supervisor, who in *Meritor* was also the harasser. *Id.* at 72-73. However, the Court also observed that "[the employer's] contention that [the victim's] failure should insulate it from liability might be substantially stronger if its procedures were better calculated to encourage victims of harassment to come forward." *Id.* at 73.

Based on the guidance of this Court and the EEOC, employers such as EEAC's member companies have established clear and unequivocal policies forbidding sexual harassment in the workplace, and procedures for prompt and appropriate handling of complaints. These employers have put in practice the EEOC's strong recommendation that:

> [a]n effective preventive program should include an explicit policy against sexual harassment that is clearly and regularly communicated to employees and effectively implemented. The employer should affirmatively raise the subject with all supervisory and non-supervisory employees, express strong disapproval, and explain the sanctions for harassment. The employer should also have a procedure for resolving sexual harassment complaints. The procedure should be designed to "encourage victims of harassment to come forward" and should not require a victim to complain first to the offending supervisor. *See Vinson*, 106 S. Ct. at 2408. It should ensure confidentiality as much as possible and provide effective remedies, including protection of victims and witnesses against retaliation.

EEOC Policy Guidance at N:4059.

When a defendant employer has in place a policy and procedure meeting these standards, allowing a Title VII recovery to a plaintiff who has failed to report harassing

conduct is tantamount to automatic liability. Where the affected employee does not make use of an anti-harassment policy, the employer has no reason to know that harassing behavior is occurring, assuming that there is no highly visible offensive conduct that would create constructive knowledge. Lacking such actual knowledge or any reason to know that unlawful conduct is occurring, the employer is unable to take steps to protect the victim from actions contrary to company policy. Yet, having set up an aggressive anti-harassment policy and procedure, the employer cannot be said to have acted negligently or to have conferred authority on a supervisor to engage in sexual harassment.

As the EEOC's guidance suggests, a good procedure encourages employees to report incidents of harassment, and includes methods to bypass the direct supervisor if that person is also the harasser. Without the victim's cooperation, even the finest anti-harassment procedure is ineffective. Even the most conscientious employer cannot know or control every day-to-day action of every employee, and must know of harassing behavior before it can take action to halt it. Holding such an employer liable for the actions of an employee that violate an express company policy when the employer had no reason to know of the offensive conduct and the victim chose, for whatever reason, not to use the vehicle the employer has created and trusted for preventing such conduct, unfairly makes that employer a "deep pocket" liable for a situation over which it had no control.

D. An Employer Who Takes Prompt and Effective Action Upon Receiving a Complaint of Harassment Should Not Be Held Liable Under Agency Theories

Prompt and effective action by an employer who *is* informed of harassing behavior likewise should obviate liability. An employer who can show that, upon learning that harassment has occurred, it conducted a thorough and *bona fide* investigation, reached a rational conclusion

and took appropriate action, should be credited for those efforts. Indeed, the circuit courts of appeals have held that such actions obviate employer liability in "hostile environment" cases. *E.g., Bouton v. BMW of N. Am., Inc.*, 29 F.3d 103, 107 (3d Cir. 1994) ("under negligence principles, prompt and effective action by the employer will relieve it of liability"); *Andrade v. Mayfair Mgmt., Inc.*, 88 F.3d 258, 261 (4th Cir. 1996) ("where an employer implements timely and adequate corrective measures after harassing conduct has come to its attention, vicarious liability should be barred . . . .").

There is no logical reason to reach a different conclusion when the case involves *quid pro quo* harassment. Where the employer, upon learning that a supervisor has imposed a tangible job detriment on an employee because she refused him sexual favors, acts promptly to eliminate the detriment, no discriminatory act has occurred. In such a situation, an employer cannot be said to have hired, fired, or otherwise discriminated against an individual "because of" sex.

In *Sims v. Brown & Root Indus. Services*, 889 F. Supp. 920 (W.D. La. 1995), *aff'd without op.*, 78 F.3d 581 (5th Cir.), *cert. denied*, 117 S. Ct. 68 (1996), a district judge in Louisiana articulated the sound policy behind this approach. In *Sims*, a female employee received numerous sexual advances from a supervisor, beginning with her job interview and continuing for nearly six months. Although Sims was given a copy of the company's policy prohibiting sexual harassment when she started work, she did not complain to anyone about the supervisor's conduct until he reduced her pay by $2.00 per hour because she continued to refuse him. At that point, Sims complained to a supervisor, who immediately reported it to Human Resources. The company responded to Sims the same day, and conducted an on-site investigation the next week. By the following week, the supervisor had been fired, and all of Sims' lost pay had been restored. Sims then quit and sued the company for sexual harassment.

In granting summary judgment for the company, the district judge commented that "Brown & Root's sexual harassment policy, which provides a clear avenue for all abused employees by way of its Open Door Complaint Policy and hotline telephone number, actually worked in this case and should therefore be praised and celebrated as a model of efficiency." 889 F. Supp. at 929. Accordingly, the judge concluded, "[h]olding a company such as Brown & Root liable after it has taken such action would produce truly perverse incentives benefiting no one, least of all actual or potential victims of sexual harassment." *Id.* (quoting *Carmon v. Lubrizol Corp.*, 17 F.3d 791, 795-96 (5th Cir. 1994)).

As the district court explained, a contrary result "would encourage . . . the victim . . . to be silent. That is, the victim's silence would be beneficial to her Title VII claim because it would severely limit the employer's opportunity to take *prompt* remedial action. . . This would, in turn, curtail the use of sexual harassment policies to aid thoughtful employees in rectifying the situation." *Id.* at 930 (emphasis in original).

The district judge is quite correct. Where an employer acts promptly and restores the victim to the *status quo* that existed before a tangible economic detriment occurs, the victim has suffered no loss. A rule that rewards victims who remain silent both encourages the perpetuation of sexual harassment and discourages employers from developing and maintaining procedures to combat harassment.

Such a result would undermine years of progress toward the elimination of sexual harassment in the workplace. While many employers undoubtedly will retain their strong policies because it is the "right thing to do," even they may have some trepidation about conducting a thorough investigation, since doing so may only confirm their liability.

CONCLUSION

For the foregoing reasons, EEAC respectfully submits that the decision below should be reversed.

Respectfully submitted,

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No. 97-569

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

BURLINGTON INDUSTRIES, INC.

Petitioner,

v.

KIMBERLY B. ELLERTH,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether an employer is strictly liable, under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, *et seq.*, for a supervisor's request for sexual favors that is accompanied by a threat of adverse job consequences, where the threat is never fulfilled.

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation.[1] The Chamber represents an underlying membership of more than three million businesses and organizations of every size, in every sector and region. An important function of the Chamber is to represent the interests of its members in the federal courts in cases addressing issues of widespread concern to the American business community. The Chamber has participated as *amicus curiae* in several hundred cases before the Court, including numerous employment discrimination cases.[2]

This case concerns the parameters of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§ 2000e *et seq.* More specifically, the case concerns an employer's liability for a supervisor's request for sexual favors accompanied by a threat of adverse job consequences, where the threat is never implemented. Because Title VII covers

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[1] The parties have consented to the filing of this brief. Counsel for the Chamber authored this brief in its entirety. No person or entity, other than the Chamber, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

[2] *See, e.g., Faragher v. City of Boca Raton*, No. 97-282; *Walters v. Metropolitan Educ. Enters., Inc.*, 117 S. Ct. 660 (1997); *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996); *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352 (1995); *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994); *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986); *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985).

virtually all employers with fifteen or more employees, 42 U.S.C. § 2000e(b), most of the Chamber's members are subject to Title VII and are, therefore, potential defendants in sexual harassment cases. Accordingly, they have a vital interest in the Court's resolution of the issues in this case.

STATEMENT

Kimberly Ellerth ("Ellerth") was hired by Burlington Industries, Inc. ("Burlington") in March of 1993 as a merchandising assistant. She resigned in May of 1994. During her employment, Ellerth was allegedly sexually harassed by her second level supervisor, Theodore Slowik ("Slowik"). However, she never complained to her immediate supervisor or anyone in authority about this sexual harassment, even though the company had a published policy prohibiting sexual harassment, until three weeks after she resigned.

Ellerth subsequently brought suit against Burlington, contending that, as a result of Slowik's alleged misconduct, Burlington had violated Title VII. The district court ruled for Burlington, holding that, even though Slowik's alleged harassment was sufficiently severe and pervasive to alter the conditions of Ellerth's employment (and therefore constituted hostile environment sexual harassment), agency principles provided no basis upon which to impose liability on Burlington. The court also ruled for Burlington on the "*quid pro quo* insinuations" of Ellerth's claim. Pet. App. 280a. Believing that her *quid pro quo* allegations were merely a "component" of her hostile environment claim, the court held:

> [U]nder the facts of this case . . . although the *quid pro quo* element of Ellerth's hostile environment is not insubstantial, . . . the negligence standard generally applicable to hostile environment harassment is more applicable to this case. To apply a *quid pro quo* standard under these facts would amount to the tail wagging the dog. Moreover, to apply a *quid pro quo* standard here . . . strikes the court as manifestly unjust under the facts presented. It is undisputed that Burlington had a sexual harassment policy in place. Ellerth was fully aware of the policy and consciously chose to disregard it. Under these facts, there is simply no just reason to impose strict liability on Burlington for the hostile environment created by Slowik.

Pet. App. 284a-285a.[3/]

[3/] Pet. App. 280a. The district court did not believe that Ellerth had advanced a separate claim of *quid pro quo* sexual harassment. The court stated:

> We do not mean to suggest that Ellerth has advanced a claim of *quid pro quo* sexual harassment. She has not. Both her complaint and her memorandum of law opposing Burlington's motion for summary judgment expressly indicate that the nature of Ellerth's sexual harassment claim is that she was subject to a hostile work environment.

Pet App. 264a n.10; *see also* Pet. App. 284a ("Of course, Ellerth does not purport to base her claim on a *quid pro quo* theory"). Judge Coffey agreed, arguing that Ellerth waived her *quid pro quo* claim by failing to raise it in her EEOC complaint or her district court pleadings. Pet App. 137a. The remaining

The *quid pro quo* allegations to which the district court referred did not involve tangible economic harm, but rather *threats* of economic harm — threats that were implicit, rather than direct, and that were never carried out. According to Ellerth:

> • In the lounge of a hotel during a business trip, Slowik said, "you know, Kim, I could make your life very hard or very easy at Burlington." Pet App. 27a.
>
> • In a telephone conversation, when Ellerth requested permission to do a special assignment, Slowik said, "I don't have time for you right now, Kim, unless you tell me what you're wearing." *Id.*
>
> • In yet another telephone conversation, he denied her request, and then asked her if she were wearing shorter skirts, because that would make her job "a whole heck of a lot easier." *Id.*
>
> • During a promotion interview, Slowik allegedly rubbed Ellerth's knee and said he had hesitations about promoting her because she was "not loose enough for him." *Id.*

Notwithstanding these allegations, Ellerth was in fact promoted. *Id.* at n.13. And there was no evidence whatsoever that she suffered any other economic or other tangible harm due to rebuffing Slowik's alleged sexual advances.

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members of the court of appeals, however, apparently disagreed. *Id.*

A majority of the court of appeals nevertheless held that Slowik's unfulfilled threats, if proven, would constitute *quid pro quo* sexual harassment for which Burlington would be strictly liable. Pet App. 6a. Explaining this view, Judge Flaum stated:

> [A] clear and serious *quid pro quo* threat alters the "terms and conditions" of employment in such a way as to violate Title VII and therefore can constitute an actionable claim even if the threat remains unfulfilled.

Pet. App. 17a.

Five judges disagreed. Chief Judge Posner and Judge Manion urged that an unfulfilled threat be characterized as hostile environment sexual harassment. Pet. App. 50a-55a, 158a-161a. Under their view, a court would distinguish between cases involving a "company act," i.e., an act that significantly alters the terms or conditions of employment of the victim of sexual harassment, and a "noncompany act," which signifies hostile environment sexual harassment that involves only unfulfilled threats, so that no company act is committed. Pet. App. 54a. Only the former would constitute *quid pro quo* harassment giving rise to strict employer liability. *Id.* at 54a-55a, 160a-161a.

Judge Coffey would also characterize an unfulfilled threat as hostile environment sexual harassment. Pet. App. 94a-106a. Under his view, a plaintiff could proceed on a *quid pro quo* theory only if she could establish that she had "actually suffered a tangible, job-related loss (such as being fired or denied a promotion) for refusing to go along with the harasser's sexual demands." Pet. App. 105a (emphasis omitted).

Judge Easterbrook similarly stated that an unfulfilled threat should be analyzed as a hostile environment claim. In his view, Ellerth received her injury "exclusively from [her] supervisor's boorish conduct, rather than via the pay envelope or by submitting to unlawful demands." Pet. App. 151a-152a.

Judge Kanne advocated an approach that combines elements from the views of the other judges. Pet. App. 33a. Agreeing with Chief Judge Posner, he would not impose strict liability on an employer for an unfulfilled threat, because doing so would

> yield little (if any) greater deterrence and generate significantly greater litigation costs than a negligence standard. Moreover, *quid pro quo* threats may be ambiguous, and if such threats make an employer strictly liable, plaintiffs will attempt to turn all instances of supervisor sexual harassment into "implied threats" in order to take advantage of strict liability's easier burden of proof.

Id. Judge Kanne agreed with Judge Flaum, however, that an unfulfilled threat should be actionable as a *quid pro quo* claim. In most cases, characterizing a threat as a *quid pro quo* claim will "not make much practical difference because the supervisor's threat will already be relevant to the hostile environment negligence analysis." *Id.* at 34a. But in a case where the threat stands alone, a negligent employer should be liable, "because of the qualitatively more oppressive nature of *quid pro quo* harassment." *Id.* at 33a-34a.

SUMMARY OF ARGUMENT

As presented by the court below, the question in this case is the definition of "an actionable *quid pro quo*," which, according to the court, "is central to the [employer] liability standard." Pet. App. 17a. That formulation, however, assumes that sexual harassment must necessarily be characterized as either "hostile environment" or "*quid pro quo*," and that the standard for employer liability for the two types of harassment is necessarily different.

By their insistence on an inflexible categorization of sexual harassment with differing standards of employer liability, the lower courts have created an unnecessary quandary. If a supervisor's unfulfilled threat of adverse job consequences is characterized as *quid pro quo* sexual harassment, the employer becomes strictly liable under the majority view, even though the supervisor has not exercised his delegated authority, and thus has taken no action susceptible to review and monitoring by the employer. If this unfulfilled threat is characterized as hostile environment sexual harassment, it may not be actionable unless it is part of a pervasive pattern of sexual misconduct by the supervisor, and thus may leave its victim without recourse. Neither result is fully consistent with the objectives of Title VII or this Court's teachings.

Stating the dilemma, however, also suggests its resolution. To the extent there continue to be two separate employer liability standards for sexual harassment, depending on whether the harassment is characterized as hostile

environment or *quid pro quo*,[4] the Court should hold that an unfulfilled threat of adverse job consequences is a hybrid form of harassment, with aspects of both categories. An unfulfilled threat should be actionable, even if it constitutes an isolated incident, where the facts demonstrate that the threat was sufficiently severe or egregious to alter the terms and conditions of the plaintiff's employment. But as with other sexual misconduct that does not involve tangible job consequences, an employer should be liable for an unfulfilled threat only if negligent, i.e., only if it knew or should have known of the threat, and failed to take prompt remedial action.

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[4] The Court has yet to resolve this question. The Court is currently reviewing, in *Faragher v. City of Boca Raton*, No. 97-282, the view of a majority of the lower courts that an employer is liable for hostile environment sexual harassment only if negligent. And although the Court declined to review the holding of the court below that an employer is strictly liable for *quid pro quo* sexual harassment, Judge Coffey noted in his decision that this strict liability standard is contrary to the Court's decision in *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986) and at odds with the agency principles that the Court has instructed the lower courts to consider in Title VII cases. Pet. App. 60a (Coffey, J., concurring and dissenting). *See also Sims v. Brown & Root Indus. Servs., Inc.*, 78 F.3d 581 (5th Cir. 1996) (unpublished table decision), *aff'g* 889 F. Supp. 920 (W.D. La. 1995), *cert. denied*, 117 S. Ct. 68 (1996) (rejecting strict liability for *quid pro quo* harassment). For purposes of this brief, however, the Chamber will assume that there are two separate standards.

ARGUMENT

A. The Distinction Between Quid Pro Quo and Hostile Environment Sexual Harassment Evolved to Describe the Kind of Conduct that is Actionable Under Title VII, Not the Circumstances Under Which an Employer Should Be Liable for an Actionable Claim.

In *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977), the Court of Appeals for the District of Columbia Circuit became the first appellate court to hold that sexual harassment violates Title VII, where a woman's job was abolished in retaliation for her refusal to engage in sexual relations with her male supervisor. Other courts of appeals soon followed suit. *See, e.g., Tomkins v. Public Serv. Elec. & Gas Co.*, 568 F.2d 1044 (3d Cir. 1977); *Garber v. Saxon Business Prods.*, 552 F.2d 1032 (4th Cir. 1977) (per curiam).

Barnes also addressed the circumstances under which an employer would be liable for sexual harassment by a supervisory employee. Judge Robinson, joined by Chief Judge Bazelon, stated that:

> Generally speaking, an employer is chargeable with Title VII violations occasioned by discriminatory practices of supervisory personnel. We realize that should a supervisor contravene employer policy without the employer's knowledge and the consequences are rectified when discovered, the employer may be relieved of liability under Title VII. But, so far as we are aware, the [employer in this case] is not in position to claim exoneration on that theory.

561 F.2d at 993 (footnote omitted). The third member of the panel, Judge MacKinnon, examined the issue in greater detail, and concluded that the general rule — that an employer is vicariously liable for the discriminatory acts of its supervisors — should not attach in a sexual harassment case. *Id.* at 1001. He nevertheless concurred in the panel's decision, because the facts suggested that Barnes' employer knew or should have known of the harassment involved and had "ratified" the discrimination her supervisor allegedly had imposed upon her. *Id.*

Neither *Garber* nor *Tomkins* expressly addressed the issue of employer liability, because the plaintiffs in those cases alleged either that the employer had acquiesced in a practice of compelling female employees to submit to sexual advances of their male supervisors, *Garber*, 552 F.2d 1032, or that the employer knew or should have known about the alleged harassment. *Tomkins*, 568 F.2d at 1047. In *Miller v. Bank of Am.*, 600 F.2d 211 (9th Cir. 1979), however, the Court of Appeals for the Ninth Circuit held that employers are strictly liable for sexual harassment involving the actions of a supervisor. *Id.* at 213.

In 1981, the Court of Appeals for the District of Columbia Circuit again led the way, recognizing a claim under Title VII for what has now come to be known as hostile environment sexual harassment. In *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981), the court held that a plaintiff stated a claim for sexual harassment "where the employer created or condoned a substantially discriminatory work environment, regardless of whether the complaining employee[] lost any tangible job benefits as a result of the discrimination." *Id.* at 943-44. And while the court again noted that "an employer is liable for discriminatory acts committed by supervisory personnel," *id.* at 943 (citing *Barnes v. Costle*, 561 F.2d at

993), it added that the case also satisfied the "more stringent test" of employer liability advocated by Judge MacKinnon in *Barnes*, because the employer was "in full knowledge of the alleged offense" "yet impeded the complaint and even abetted the offenses." *Id.* at n.8.

In these early cases, the distinction between *quid pro quo* and hostile environment sexual harassment related solely to the elements necessary to state a claim. The circumstances under which an employer was liable for the harassment, particularly where it was committed by a supervisor, was analyzed separately. In *Henson v. Dundee*, 682 F.2d 897 (11th Cir. 1982), however, the Court of Appeals for the Eleventh Circuit combined the two analyses. Following the lead of the District of Columbia Circuit, the court held that "a hostile or offensive atmosphere created by sexual harassment can, standing alone, constitute a violation of Title VII." *Id.* at 902. And the court held that, where the plaintiff seeks to hold the employer responsible for the hostile environment created by her supervisor, "she must show that the employer knew or should have known of the harassment in question and failed to take prompt remedial action." *Id.* at 905. But the court contrasted this "condition of work" harassment with "*quid pro quo*" harassment, *id.* at 909 & n.18, stating that an employer "is strictly liable for sexual discrimination by supervisors that causes tangible job detriment." *Id.* at 909. The court thus became the first appellate court to articulate clearly a distinction regarding the standard for imposing liability on an employer, based on whether the alleged harassment was *quid pro quo* or hostile environment. It did so, moreover, notwithstanding its observation that, "[o]n a practical level . . . there are many cases that could be characterized interchangeably as condition of work or *quid pro quo* cases." *Id.* at 909 n.18.

Other courts subsequently adopted the distinction set forth in *Henson*, at least insofar as the distinction defined the kind of conduct that was actionable under Title VII. Many of the courts also adopted the employer liability standard that *Henson* attached to the two types of claims. *See, e.g., Highlander v. K.F.C. Nat'l Management Co.*, 805 F.2d 644, 648-49 (6th Cir. 1986); *Jones v. Flagship Int'l*, 793 F.2d 714, 719-22 (5th Cir. 1986), *cert. denied*, 479 U.S. 1065 (1987); *Crimm v. Missouri Pacific R.R. Co.*, 750 F.2d 703, 710 (8th Cir. 1984); *Katz v. Dole*, 709 F.2d 251, 254-56 (4th Cir. 1983). Several of the courts, however, appeared to hold that an employer could be strictly liable for a supervisor's sexual harassment, without regard to which type of claim was involved. *See, e.g., Horn v. Duke Homes*, 755 F.2d 599, 604-05 (7th Cir. 1985) (adopting EEOC rule that an employer is responsible for the acts of its supervisors with respect to sexual harassment regardless of whether the employer knew or should have known of their occurrence); *Craig v. Y&Y Snacks, Inc.*, 721 F.2d 77, 81 (3d Cir. 1983) ("employer liability follows when the supervising employee has broad authority over employment decisions"); *Miller v. Bank of Am.*, 600 F.2d at 213.

This Court considered these issues for the first time in *Meritor*. Noting that the proscriptions of Title VII are not limited to "economic" or "tangible" discrimination, 477 U.S. at 64, the Court confirmed that sexual harassment that is "sufficiently severe or pervasive `to alter the conditions of [the victim's] employment and create an abusive working environment'" is actionable. *Id.* at 67 (quoting *Henson v. Dundee*, 682 F. 2d at 904). Like the Eleventh Circuit in *Henson*, the Court contrasted this "so-called `hostile environment'" sexual harassment with sexual misconduct directly linked to the grant or denial of an economic *quid pro quo*, 477 U.S. 65, and rejected the district court's apparent

belief that a claim for sexual harassment will not lie absent an economic effect on the complainant's employment. *Id.* at 67-68.[3/]

The Court further held, however, that the court of appeals had erred "in concluding that employers are always automatically liable for sexual harassment by their supervisors," "regardless of the circumstances of a particular case." *Id.* at 72, 73. Recognizing that an employer *may* be liable under Title VII for supervisory sexual harassment, the Court "declined . . . to issue a definitive rule on employer liability," leaving it to the lower courts to develop a standard. *Id.* at 72.

Because *Meritor* was a hostile environment case, many of the lower courts interpreted the Court's employer liability holding to apply only to hostile environment claims. Thus, most of the courts have held that an employer is liable for hostile environment sexual harassment by a supervisor only if the employer was negligent. *See, e.g., Faragher v. City of Boca Raton*, 111 F.3d 1530 (11th Cir.), *cert. granted*, 118 S. Ct. 438

[3/] The Court further elaborated on the definition of "hostile environment" sexual harassment in *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993). The standard "takes a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury." *Id.*, 510 at 21. Circumstances to be considered in determining whether an environment is hostile or abusive, and therefore actionable, "may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Id.* at 23.

(1997); *Davis v. City of Sioux City*, 115 F.3d 1365, 1368 (8th Cir. 1997); *Farpella-Crosby v. Horizon Health Care*, 97 F.3d 803, 807 (5th Cir. 1996); *Andrade v. Mayfair Management, Inc.*, 88 F.3d 258, 261 (4th Cir. 1996); *Nichols v. Frank*, 42 F.3d 503, 508 (9th Cir. 1994); *Lipsett v. Univ. of Puerto Rico*, 864 F.2d 881, 901 (1st Cir. 1983). A majority of the courts of appeals, however, like the court below, have held, notwithstanding *Meritor*, that an employer *is* strictly liable for *quid pro quo* sexual harassment. *See, e.g., Nichols*, 42 F.3d at 513-14 (collecting cases); *Bouton v. BMW of N. Am., Inc.*, 29 F.3d 103, 106-07 (3d Cir. 1994); *Karibian v. Columbia Univ.*, 14 F.3d 773, 779 (2d Cir.), *cert. denied*, 512 U.S. 1213 (1994); *Sauers v. Salt Lake County*, 1 F.3d 1122, 1127 (10th Cir. 1993); *Kauffman v. Allied Signal, Inc.*, 970 F.2d 178, 185-86 (6th Cir.), *cert. denied*, 506 U.S. 1041 (1992). *But see Sims*, 78 F.3d 581, *aff'g* 889 F. Supp. 920.

Thus, a distinction that evolved merely to broaden Title VII's reach regarding the conduct that will be actionable has now become a distinction that governs the circumstances under which an employer will be liable for that misconduct. As the unfulfilled threats alleged in this case illustrate, however, some sexual harassment claims do not fall readily into either category, and must, therefore, be analyzed on their own.

B. Employers Should Not Be Strictly Liable For a Supervisor's Unfulfilled Threats.

As a result of the manner in which the law in this area has developed, categorizing a sexual harassment claim as either *quid pro quo* or hostile environment will, in most courts, govern whether a non-negligent employer, such as Burlington, is liable for the misconduct. Such was the case in *Gary v. Long*, 59 F.3d 1391 (D.C. Cir.), *cert. denied*, 116 S. Ct. 569

(1995). In *Gary*, there was "no doubt that [the supervisor's] alleged conduct was sufficiently severe and pervasive to create a hostile work environment." *Id.* at 1397. But after applying agency principles, the court held that the employer was not liable for the misconduct. *Id.* at 1397-99.

The plaintiff in *Gary* also claimed, however, that her supervisor's conduct gave rise to a *quid pro quo* claim, making the employer strictly liable for the supervisor's misconduct. As she described it, this conduct consisted of "work-related threats and promises by a supervisor with actual or apparent authority to make good on those threats and promises." *Id.* at 1396. Rejecting her claim, the court of appeals observed that "it takes more than saber rattling alone to impose *quid pro quo* liability on an employer." For *quid pro quo* harassment to exist, "the supervisor must have wielded the authority entrusted to him to subject the victim to adverse job consequences as a result of her refusal to submit to unwelcome sexual advances." *Id.* at 396 (citations omitted).

Similarly, in *Highlander*, the court affirmed the dismissal of the plaintiff's *quid pro quo* claim where "the record [was] totally devoid of any evidence tending to demonstrate that plaintiff was denied a job benefit or suffered a job detriment as a result of her failure to engage in the activity suggested by [the supervisor]". 805 F.2d at 649. *See also, e.g., Ellert v. University of Texas*, 52 F.3d 543, 545 (5th Cir. 1995) (*quid pro quo* claim requires proof that employee's reaction to harassment affected tangible aspects of employment); *Sauers v. Salt Lake County*, 1 F.3d at 1127 (for a *quid pro quo* claim, plaintiff must "show that she suffered an economic injury from her supervisor's actions"); *Kauffman v. Allied Signal*, 970 F.2d at 187 (remanding *quid pro quo* claim for determination whether plaintiff suffered tangible job detriment); *Chamberlin*

v. 101 Realty, Inc., 915 F.2d 777, 784 (1st Cir. 1990) (*quid pro quo* claim requires proof of tangible job detriment).

The holdings in these cases are entirely consistent with the Court's decision in *Meritor*. *Meritor* established that sexual harassment leading to noneconomic injury can violate Title VII, 477 U.S. at 65, but it also established that employers are not strictly liable for this type of sexual harassment by their supervisors. *Id.* at 72. By definition, unfulfilled threats involve no tangible or economic harm; accordingly, under *Meritor*, an employer may not be held strictly liable for such threats.

This result is also consistent with the objectives of Title VII: effective deterrence and compensation for harm. *See* H.R. Rep. No. 102-40(I), at 18 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 556. As Chief Judge Posner explained below, the emphasis in sexual harassment cases should be primarily on deterrence because, "unlike many torts . . . sexual harassment does not usually bring about a significant change in the victim's wealth." Pet. App. 44a (Posner, C.J., concurring and dissenting). And effective deterrence can best be achieved by a liability standard that creates a financial incentive for employers to manage and monitor their exposure, without imposing compliance costs in excess of the cost of an occasional adverse judgment.

A reasonable employer, knowing it will be liable for its supervisors' sexual harassment only if it is negligent, will take steps to prevent this result. It will, for example, publish a policy defining and prohibiting sexual harassment. It will make it clear that employees who violate the policy, including supervisors, will be promptly and effectively disciplined. It will encourage employees to report sexual harassment. And it will promptly investigate any complaint of sexual harassment and, where warranted, take appropriate remedial action.

A reasonable employer may, moreover, monitor the "company acts" of its supervisors, to ensure that these acts are motivated only by proper reasons. Thus, for example, it may require that all supervisory decisions be documented. Or it may establish an effective internal grievance procedure. Steps of this nature can and do limit, if not eliminate, the potential for a supervisor to exercise the employer's authority to sexually harass a subordinate.

Employers will be motivated to take such steps, however, only if they perceive there is a benefit to be gained from doing so. Most employers, of course, will consider it in their interest to eliminate sexual harassment and other forms of discrimination from the workplace in any event, if only because this type of misconduct leads to unhappy, and therefore less productive, workers. But because vigilant efforts to stamp out all discriminatory conduct can be costly, the additional financial incentive of avoiding liability will motivate employers to take even greater steps to ensure that they are not found negligent in their efforts to prevent sexual harassment if the liability avoided is greater than the added expense. *See* Stacy Dansky, Note, *Eliminating Strict Employer Liability in Quid Pro Quo Sexual Harassment Cases*, 76 Tex. L. Rev. 435, 454 (1997) ("[i]f an employer is subject to a knew-or-should-have-known standard, it will not have the incentive to ignore the harassment; rather, it will be sure to establish preventative and remedial programs to insulate itself from liability"); Pet. App. 33a (Kanne, J., concurring) ("[a] negligence standard will serve to deter *quid pro quo* threats because employers will rationally seek to avoid liability" by establishing policies to prevent improper conduct and by imposing appropriate sanctions against violators).

If, however, an employer is to be strictly liable for sexual harassment notwithstanding its efforts, it may determine

that the costs of prevention are simply too great, particularly in the case of sexual misconduct that does not involve a "company act." As Chief Judge Posner explained:

> Suppose the supervisor threatens to fire a subordinate unless she'll have sex with him, and she agrees—or refuses and he does not carry out on his threat. In either case, because he has not used his delegated authority to commit a company act, there is no way in which a system for vetting such acts would catch him out.

Pet. App. 51a. *See also* Pet. App. 33a (Kanne, J., concurring) ("there is not much an employer realistically can do to put a stop to *quid pro quo* threats that do not result in any adverse job consequences). If non-negligent employers are to be held strictly liable in circumstances such as these, where even extraordinary efforts to monitor their exposure are unlikely to be uniformly effective, many employers may decide that it is less costly simply to bear the financial burden of an occasional judgment. *See* Nancy Brown, Note, *Meritor Savings Bank v. Vinson: Clarifying the Standards of Hostile Working Environment Sexual Harassment*, 25 Hous. L. Rev. 441, 461 (1988) ("strict liability standard causes employers to wonder why they should take any preventative measures at all").[6]

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[6] Based on a similar analysis, Chief Judge Posner concluded that strict liability *is* justified for sexual harassment that involves a company act, but not for harassment that does not involve such an act. The logic of this analysis, however, applies equally to both forms of sexual harassment, because strict liability will, in either case, frequently make it less attractive for an employer to take extraordinary (and often

Moreover, as Judge Kanne observed, there is yet another adverse consequence that will flow from imposing strict liability on employers for their supervisors' unfulfilled threats: the likelihood that plaintiffs will allege an implied threat in every supervisory sexual harassment case, to take advantage of strict liability's easier burden of proof. Pet. App. 33a (Kanne, J., concurring). This case, in fact, vividly illustrates that phenomenon. Apparently recognizing that Burlington had not been negligent and would not, therefore, be held liable for hostile environment sexual harassment, Ellerth dropped her hostile environment claim and instead pursued a claim for *quid pro quo* harassment based on implied threats allegedly made by her supervisor.

The Sixth Circuit's decision in *Highlander* provides another example demonstrating the legitimacy of Judge Kanne's concern. The plaintiff in *Highlander* failed to state a claim for hostile environment sexual harassment because she "failed to demonstrate that she was offended in any significant way by the asserted incidents" or that "the asserted incidents, if in fact they occurred, had the effect of reasonably interfering with [her] work performance." 805 F.2d at 644, 650. The plaintiff then asserted a *quid pro quo* claim, contending that her supervisor had "placed his arm around her and stated that if she was interested in becoming a co-manager, `there is a motel across the street.'" *Id.* at 645. Rejecting her claim, the court noted that this alleged threat was, by the plaintiff's own testimony, induced by her suggestion that she and the supervisor meet in a bar to discuss her promotion opportunities, and that both she and her husband had discounted the seriousness of the incident immediately after it occurred. In

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costly) steps to monitor and prevent sexual harassment in the workplace.

addition, "the record was totally devoid of any evidence tending to demonstrate that plaintiff was denied a job benefit or suffered a job detriment as a result of her failure to engage in the activity suggested by [her supervisor]." *Id.* at 649. To the contrary, the evidence adduced at trial disclosed that the supervisor had no role whatsoever in the company's subsequent decision to terminate the plaintiff's employment due to her repeated absences from work. *Id.* Thus, the Court did not permit the plaintiff to convert her failed hostile environment claim into a *quid pro quo* claim in order to hold the employer strictly liable.

In other courts, however, plaintiffs have prevailed in this effort, despite their employers' diligent efforts to prevent sexual harassment. In *Reinhold v. Virginia*, 1998 U.S. App. LEXIS 1669 (4th Cir. 1998), for example, the court held that the employer was not liable for hostile environment sexual harassment, because it took prompt and effective remedial action as soon as it learned of the supervisor's inappropriate behavior. *Id.* at *32, *48-*49. But the plaintiff also asserted a *quid pro quo* claim, alleging that her supervisor (whose sexual advances she had rejected) had denied her permission to attend a non-mandatory professional conference, and had assigned her additional work assignments. *Id.* at *37-*38. She offered no evidence of a link between either of these matters and a promotion or other tangible employment benefit, and did not demonstrate that her position, authority and responsibilities were in any way threatened. *Id.* at *52 (Niemeyer, J., concurring and dissenting). A majority of the panel nevertheless concluded that the employer would be strictly liable for the misconduct if the plaintiff proved her allegations. *Id.* at *40. The plaintiff was permitted, in other words, to "take advantage of strict liability's easier burden of proof" Pet. App. 33a, by turning her supervisor's sexual harassment into an implied threat.

C. A Supervisor's Unfulfilled Threats Should, in Some Circumstances, Be Actionable.

As discussed above, employers should not be held strictly liable for a supervisor's unfulfilled threats. However, characterizing the threat as a hostile environment claim to avoid strict liability may lead to another untenable result: an isolated incident, even one involving egregious circumstances, may not be found actionable. Analyzing unfulfilled threats independently of whether they qualify as *quid pro quo* or hostile environment claims will also avoid this consequence.

In the District of Columbia Circuit's decision in *Gary*, the unfulfilled threats about which the plaintiff complained were one component of a pattern of extremely egregious sexual harassment, "culminating in a rape." 59 F.3d at 1397. Indeed, there was "no doubt" that the alleged misconduct created a hostile work environment. *Id.* But had the threats in *Gary* stood alone, the court of appeals likely would have held that they were not actionable under Title VII, even if the employer had been negligent. Based on their understanding of this Court's decisions in *Meritor* and *Harris*, the lower courts routinely hold that a plaintiff fails to state a claim for hostile environment sexual harassment unless the sexual misconduct is "pervasive," i.e., involves repeated incidents of misconduct. *See, e.g., McKenzie v. Illinois Dep't of Transp.*, 92 F.3d 473, 480 (7th Cir. 1996) (harassment not actionable because it involved only "three sexually suggestive comments over a three-month period"); *Kotcher v. Rosa & Sullivan Appliance Ctr., Inc.*, 957 F.2d 59, 62 (2d Cir. 1992) ("[harassing] incidents must be repeated and continuous"); *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 622 n.7 (6th Cir. 1986) (harassment must be "systematically directed to the plaintiff over a protracted period of time), *cert. denied*, 481 U.S. 1041 (1987); *Moylan v. Maries County*, 792 F.2d 746, 749 (8th Cir.

1986) (isolated incidents not sufficient to establish a violation); *Downes v. FAA*, 775 F.2d 288 (Fed. Cir. 1985) ("a pattern of offensive conduct must be proved). Thus, if analyzed under a traditional "hostile environment" framework, an unfulfilled threat may not be actionable at all under Title VII.

The Court's prior decisions, however, do not require that result. To be sure, the Court stated in *Meritor* that "[f]or sexual harassment to be actionable, it must be sufficiently severe or pervasive `to alter the conditions of [the victim's] employment and create an abusive environment'." 477 U.S. at 67 (quoting *Henson v. Dundee*, 682 F.2d at 904). But the Court further suggested that some conduct may be sufficiently serious in and of itself to state a claim. *Id.* (noting that the respondent's allegations, which include "criminal conduct of the most serious nature — are plainly sufficient"). Similarly, in *Harris*, the Court observed that the factors that may be considered in determining whether an environment is hostile and abusive include not only the "frequency of the discriminatory conduct," but also its "severity" and "whether it is physically threatening or humiliating." 510 U.S. at 23.

In applying these principles, it makes little difference whether allegations of unfilled threats are labeled as "hostile environment" or "*quid pro quo*" claims, because these are judicially created terms that do not appear in the text of the statute. What *is* important is that the Court evaluate such claims under a standard that is consistent with the Court's precedents and with the language and purposes of Title VII.

In accordance with these objectives, a supervisor's unfulfilled threat of adverse job consequences should be actionable if it is part of a pattern of sexual misconduct sufficiently severe to alter the terms and conditions of the plaintiff's employment. Such a threat should also be actionable

where the facts and circumstances establish that it is sufficiently egregious that, even standing alone, it alters the terms and conditions of the plaintiff's employment. In either case, however, the employer should be held liable only if negligent, i.e., only if it knew or should have known of the supervisor's misconduct and failed to take prompt and effective remedial action.

To illustrate, suppose that a supervisor never carries out a threat of adverse job consequences because the employee submits to his sexual blackmail. Under that scenario, even a single incident may be so egregious that it alters the conditions of the victim's employment. *See Chamberlin*, 915 F.2d at 783 ("a supervisor's demand that an employee submit to an unwelcome sexual advance or face discharge from employment could well constitute a sustainable *quid pro quo* harassment claim"). *Cf. Daniels v. Essex Group, Inc.*, 937 F.2d 1264, 1274 & n.4 (7th Cir. 1991) (a single egregious incident, such as performing Ku Klux Klan ritual in workplace, would create racially hostile environment).

By contrast, suppose that an employee rebuffs a supervisor's sexual advance, yet the supervisor never carries out a threat of adverse job consequences. In practice, as Judge Kanne observed, such a threat will rarely stand alone. (Pet. App. 34a.) And such a threat, in combination with other incidents, could obviously contribute to a pattern of misconduct "sufficiently severe . . . 'to . . . create an abusive working environment.'" *Meritor*, 477 U.S. at 67. But an isolated threat of this nature would not ordinarily be sufficient to alter the terms and conditions of an individual's employment, and would not, therefore, be actionable under Title VII.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

BURLINGTON INDUSTRIES,

Petitioner,

v.

KIMBERLY B. ELLERTH,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Certiorari was granted on the following question, as framed by petitioner Burlington Industries, Inc.: Whether a claim of *quid pro quo* sexual harassment may be stated under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, et seq., where the plaintiff employee has neither submitted to the sexual advances of the alleged harasser nor suffered any tangible effects on the compensation, terms, conditions or privileges of employment as a consequence of a refusal to submit to those advances?

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INTEREST OF *AMICUS CURIAE*[1]

The National Employment Lawyers Association (NELA) is a voluntary membership organization of over 3,000 lawyers who regularly represent employees in labor, employment, and civil rights disputes. NELA is one of the largest organizations in the United States whose members litigate and counsel individuals, employees, and applicants for employment on claims arising out of the workplace. As part of its advocacy efforts, NELA has filed numerous *amicus curiae* briefs before this Court, singly or jointly with other amici. Some recent cases include *Faragher v. City of Boca Raton*, No. 97-282 (1997); *Oncale v. Sundowner Offshore Services, Inc.*, No. 96-568, 66 U.S.L.W. 4172 (U.S. March 4, 1998); *Oubre v. Entergy Operations, Inc.*, 117 S.Ct. 1466 (1997); *Robinson v. Shell Oil Co.*, 117 S.Ct. 843 (1997); *O'Connor v. Consolidated Coin Caterers Corp.*, 116 S.Ct. 1307 (1996); *McKennon v. Nashville Banner Publishing Systems, Inc.*, 513 U.S. 352 (1995); *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993); and *Hazen Paper Co. v. Biggins*, 508 U.S. 948 (1993).

NELA members represent thousands of individuals in this country who are victims of unlawful employment discrimination, including sexual harassment. Both before and since this Court's opinion in *Meritor Savings v. Vinson*, 477 U.S. 57 (1986), courts have struggled to determine when a plaintiff had alleged sufficient facts to set forth a proper claim of *quid pro quo* sexual harassment. NELA submits this brief to

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[1] The parties have consented to the filing of this brief. Counsel for a party did not author this brief in whole or in part. With the exception of the fact that counsel for petitioner, Ernest Rossiello and Elena Dimopoulos, are members of NELA and, as such, pays general membership dues, no persons other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

address this important question of law, and, in so doing, to protect the interests of its members' clients, by helping to ensure that Title VII's goal of eradicating employment discrimination is fully realized.

SUMMARY OF ARGUMENT

NELA urges this Court to dismiss the writ of certiorari as improvidently granted. *Amicus* submits that the question presented by petitioner is completely at odds with the factual record before the Court.

Should this Court determine that it will not dismiss Petitioner's Writ of Certiorari, *Amicus* urges this Court to hold that "tangible effects" need not be shown by a victim of *quid pro quo* discrimination prior to recovering against the employee for a supervisor's sexual harassment.

Amicus further urges this Court to hold that a plaintiff employee need not submit to the sexual demands of her supervisor in order to have a cause of action under Title VII. A serious *quid pro quo* threat is sufficient to trigger liability even if that threat remains unfulfilled.

PROCEDURAL STATUS OF THE CASE

Respondent Kimberly B. Ellerth [Ellerth] filed a civil action in the United States District Court for the Northern District of Illinois, asserting that petitioner Burlington Industries Inc., [Burlington] had discriminated against her and constructively discharged her in violation of Title VII by subjecting her to sexual harassment. The district court granted summary judgment for petitioner Burlington. Thus, all of Ellerth's allegations which are supported by substantial evidence, and are thus sufficient to justify a verdict in her favor, must be taken as true for the purpose of deciding the legal issues before this Court. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).[2]

The United States Court of Appeals for the Seventh Circuit concluded that Ellerth had waived any claim of negligence, and thus declined to rule on any theory of hostile work environment harassment; it ruled only on the claim of "*quid pro quo*" harassment. A three-judge panel, and then the full court, en banc, reversed the district court, holding that Ellerth's allegations were sufficient to justify a finding of *quid pro quo* harassment. *Jansen v. Packaging Corporation of America*, 123 F.3d 490 (7th Cir. 1997) (hereinafter *Jansen/Ellerth*) This Court granted a petition for a writ of certiorari.

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[2] NELA wishes to call to the Court's attention that, in the experience of our members, this rule is being frequently disregarded or misapplied by the district courts, who are weighing facts, making credibility determinations, and disregarding sworn affidavits and deposition testimony from plaintiffs in order to enter summary judgment for employers in sexual harassment and other discrimination cases. NELA respectfully asks this Court to use the instant case to remind the district courts that motions for summary judgment may not properly be granted unless there is no substantial evidence supporting a necessary element of the plaintiff's case, and that the existence of any disputed material fact requires that such motions be denied.

STATEMENT OF MATERIAL FACTS

Ellerth worked for Burlington in its Chicago offices from March of 1993 until May of 1994, first as a merchandising assistant (JA 118, 120),[3] and later as a sales representative (JA 121). Throughout her employment, her direct supervisor was Theodore Slowik [Slowik], a Vice President based in Burlington, New York (JA 119-121). Slowik had the ultimate decision-making authority over Ellerth's hire (JA 118-119) and her subsequent promotion (JA 121-122). After her promotion in the spring of 1994, she was required to obtain Slowik's approval before working on special projects requested by her customers (JA 144, 160).

Soon after Ellerth began working for Burlington, Slowik began a series of acts which Ellerth understood to be sexual solicitations, coupled with threats of retaliation if she refused to submit to his solicitations (JA 156). For example, in the summer of 1993, while on a business trip to North Carolina, Slowik first made a series of sexual comments about a number of women's breasts and legs, then commented on Ellerth's breasts. He also told her to "loosen up," and explained "you know Kim, I could make your life very hard or very easy at Burlington." (JA 135, 155-156). On another occasion, she understood him to demand that she perform an act of fellatio, stating "on your knees again Kim" (JA 138).

Ellerth did not submit to Slowik's solicitations. Thereafter, he subjected her to unwanted touching of her body, including her knees and buttocks (JA 132, 140, 141); numerous unwanted and offensive sexual jokes, comments and innuendos (JA 130-131, 132, 136, 137, 142, 143, 137, 153, 154, 155, 156,

[3] The designation "JA" refers to the Joint Appendix filed by the parties.

157, 158, 159, 160) including jokes suggesting that because she has blonde hair she is sexually promiscuous (JA 137, 143); unwanted statements to her and to others in her presence about her body, in particular her breasts, legs and buttocks (JA 139, 141, 142, 154, 155, 157, 158, 160); unwanted suggestions to other employees (including another Burlington vice-president) that they comment on her body (JA 133); and, in her presence and directed to her attention, unwanted sexually offensive comments about other women's bodies (JA 155). Respondent's opposition to summary judgment includes a list of over one hundred incidents that support her claim (JA 162-175).

In early 1994, Ellerth applied for a promotion from merchandising assistant to sales representative (JA 158-159). Slowik hesitated before promoting her, complaining to several Burlington employees that she was "arrogant" (JA 158-159). When she confronted him with obstructing her promotion, he rubbed her knee and explained that, in his view, she was "not loose enough" for the promotion (JA 141-142, 159).

After some delay, Ellerth was eventually promoted. In her new position, she needed Slowik's approval for certain projects (JA 144). In late April or early May of 1994, Ellerth telephoned Slowik to secure his permission to undertake a special project involving putting a customer's logo in a fabric (JA 144, 160). He refused to authorize the project unless she described to him what she was wearing (JA 144, 160). In a second phone conversation, again seeking permission for the special project, Slowik again refused to authorize the project, and asked "are you wearing shorter skirts yet, Kim, because it would make your job a whole heck of a lot easier." (JA 160). Ellerth regarded this as "the straw that broke the camel's back" (Deposition of Steven Ellerth at 90, Exhibit "F"

of Plaintiff's Appendix to Answer to Motion for Summary Judgment).

Soon thereafter, she resigned. In her resignation letter, she explained that she was resigning because of Slowik's harassment. Before submitting the letter, she redacted the portion regarding the harassment. (JA 101) However, three weeks after her resignation, Ellerth did inform Slowik's supervisors at Burlington that she had resigned because of Slowik's harassment, which she found "unbearable" (JA 15-16). Ellerth had complained about Slowik's harassment to Slowik himself (JA 149), to customer service manager Donna Thibideau (JA 148) and to five co-employees (JA 148, 133). Her harassment had been observed by Burlington vice-president Angelo Brenna (JA 133). She did not complain to Slowik's supervisors prior to her resignation because (1) she believed she would suffer retaliation if she did (JA 145-146), (2) she did not know whether Burlington's anti-harassment policy was in effect (JA 144-145), and (3) she did not know whom to complain to under the policy (JA 144-145).

ARGUMENT

I.

CERTIORARI WAS IMPROVIDENTLY GRANTED.

This Court granted certiorari based on a question presented by the petitioner that is completely at odds with the factual record established below. The question of whether a claim of *quid pro quo* sexual harassment may be stated under Title VII, where the plaintiff employee has neither submitted to the sexual advances of the alleged harasser, nor suffered any tangible effects as a consequence of a refusal to submit to those advances, is not properly presented by this case's factual record. This case's record instead fully supports allegations that in retaliation for plaintiff's refusal to submit to her supervisor's sexual advances: (1) her work-related requests were denied, (2) she was constructively discharged, (3) her promotion was delayed, and (4) she was subjected to an abusive work environment. Given the factual record now before the Court, the writ of certiorari should be dismissed as improvidently granted.

II.

QUID PRO QUO SEXUAL HARASSMENT INCLUDES THREATS BY SUPERVISORS NOT CARRIED OUT AS WELL AS THREATS FULFILLED.

If this Court determines that Petitioner's Writ of Certiorari should not be dismissed, this Court must determine the liability of the employer in situations where the victim of *quid pro quo* harassment does not submit to the sexual advances of the harasser, and must also determine what, if any, "tangible effects" the victim must show prior to recovering against the employer for *quid pro quo* harassment. As further addressed in Sec. III below, the term "tangible effects" has its roots in cases decided prior to the Civil Rights Act of 1991. Prior to the 1991 Act, plaintiffs were required to show "tangible effects" of the discrimination in order to receive injunctive relief, the only relief other than back pay available at that time. The Civil Rights Act of 1991 was enacted in part to allow victims of discrimination to receive compensatory and other legal damages. *Amicus* submits to this Court that a finding of "tangible effects" is no longer required, and that if any question remains before this Court in this case, it is only the question of whether a plaintiff employee has a cause of action under Title VII for sexual harassment, when she has not submitted to the sexual advances of the alleged harasser.

Title VII of the 1964 Civil Rights Act prohibits "discriminat[ion] . . . because of . . . sex," including sexual harassment directed at an employee because of her sex. *Oncale v. Sundowner Offshore Services*, 66 U.S.L.W. 4175 (U.S. March 5, 1998). In *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986) and *Harris v. Forklift Systems, Inc.*, 114 S.Ct. 367 (1993), this Court relied upon the position taken by the Equal Employment Opportunity Commission (EEOC) that there are two types of sexual harassment prohibited by Title VII. *Meritor* at 477 U.S. 62, 64-65; *Harris* at 114 S. Ct. 370. The first, "abusive work environment" or "hostile work environment" sexual harassment, was the subject of the Meritor and Harris cases. The second, termed "*quid pro quo*" sexual harassment, has not yet been defined by this Court. However, many of the Circuit Courts have defined "*quid pro quo*" sexual harassment to include threats of harassment (See, *Jansen/Ellerth* at 490; *Karibian v. Columbia University*, 14 F.3d 773 (2nd Cir.), *cert. denied*, 512 U.S. 1213, 114 S.Ct. 2693, 129 L.Ed.2d 824 (1994); *Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554 (11th Cir. 1987).

In the instant case, the record is clear that Ellerth did not submit to the sexual demands of her supervisor, but that she was nonetheless subjected to further threats as well as actual retaliation for her refusal to submit. Although some of those threats were never acted upon, Ellerth only learned that they were not acted upon by living through the threats and waiting to see what would happen next. Only once she was constructively terminated through her resignation could Ellerth know that there would be no further threats or the risk of career detriment at Slowik's hands.

Given the degree of authority that workplace supervisors have in our society, *amicus* submits that *quid pro quo* harassment must be deemed to have occurred when the

supervisor makes a threat, whether or not that threat is actually carried out, and that the employer must be liable for that supervisor's conduct.[4] For the employee subjected to those threats there is no difference between the two as the threats are occurring; only in hindsight can one know the difference. As Judge Flaum noted in *Jansen/Ellerth*, "a clear and serious *quid pro quo* threat alters the 'terms and conditions' of employment in such a way as to violate Title VII and therefore can constitute an actionable claim even if the threat remains unfulfilled . . . [N]ow that emotional damage is compensable, the scope of *quid pro quo* should encompass clear unfulfilled threats that cause serious emotional harm." 123 F.3d at 499.

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[4] *Amicus* limits this issue to one of the employer's liability because every Circuit, except the First, has held that there is no individual liability under Title VII, leaving the victim of discrimination without a remedy if the employer is not held responsible. See *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1313 (2nd Cir. 1995); *Sheridan v. E.I. DuPont Nemours and Co.*, 100 F.3d 1061 (3rd Cir. 1996); *Dici v. Com. of Pa.*, 91 F.3d 542, 552 (3rd Cir. 1996); *Birkbeck v. Marvel Lighting Corp.*, 30 F.3d 507, 512 (4th Cir.), cert denied, 513 U.S. 1058, 115 S.Ct. 666, 130 L.Ed.2d 600 (1994); *Grant v. Lone Star Co.*, 21 F.3d 649, 653 (5th Cir.), *cert. denied*, 513 U.S. 1015, 115 S.Ct. 574, 130 L.Ed.2d (1994); *Wathen v. General Electric Co.*, 115 F.3d 400, 405 (6th Cir. 1997); *Williams v. Banning*, 72 F.3d 552 (7th Cir. 1995); *Bonomolo-Hagen v. Clay Central-Everly Community School Dist.*, 1997 WL 467573 (8th Cir. 1997); *Miller v. Maxwell's Int'l Inc.*, 991 F.2d 583, 587-88 (9th Cir. 1993), *cert. denied*, 510 U.S. 1109, 114 S.Ct. 1049, 127 L.Ed.2d 372 (1994); *Haynes v. Williams*, 88 F.3d 898, 900 (10th Cir. 1996); *Smith v. Lomax*, 45 F.3d 402, 405 (11th Cir. 1995); *Gary v. Long*, 59 F.3d 1391, 1399 (D.C. Cir.), *cert denied*, ___ U.S. ___,116 S.Ct. 569, 133 L.Ed.2d 493 (1995). The First Circuit has declined to answer the question, describing the issue of individual liability under Title VII as "potentially difficult." *Margarita Serapion v. Fred H. Martinez*, 1997 WL 394605 (1st Cir. 1997). Language in other cases from the First Circuit suggest that it too will follow the other circuits in holding there is no individual liability. See, e.g., *Morrison v. Mills*, 108 F.3d 429 (1st Cir. 1997).

The EEOC in 1980 and again in 1990 issued directives which considered unfulfilled threats to be within the scope of Title VII. Both these directives were drafted prior to the Civil Rights Act of 1991; hence they still referred to Title VII in terms of injunctive relief only. However, in its 1980 Guidelines on the Law of Sexual Harassment, the EEOC defined *quid pro quo* sexual harassment as occurring "when (1) submission to such conduct by an individual is made either explicitly or implicitly a term or condition of an individual's employment [or] (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual." EEOC Guidelines, 29 C.F.R. §1604.11(a)(1)(1980). These Guidelines have been recognized by this Court as "a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Meritor*, 477 U.S. at 65, quoting *General Electric Co. v. Gilbert*, 429 U.S. 125, 141-142 (1971).

In 1990 the EEOC issued its "Policy Guidance on Sexual Harassment" interpreting this Court's decision in Meritor and its effect on the 1980 Guidelines. EEOC: Policy Guidance on Sexual Harassment (3/19/1990) in Gamble, Sex Discrimination Handbook (BNA 1992) at 328, 329 (hereinafter "Policy Guidance"). Although the Guidance was also enacted prior to the Civil Rights Act of 1991, and therefore assumes that injunctive relief is the only relief available to victims of sex discrimination, the Guidance is informative as it sheds some light on the EEOC's interpretation of the elements of a *quid pro quo* claim. The EEOC explained that harassment that begins as hostile work environment harassment may be transformed into *quid pro quo* harassment. "For example, an employee's tangible job conditions are affected when a sexually hostile work environment results in her constructive discharge. Similarly, a supervisor who

makes sexual advances toward a subordinate employee may communicate an implicit threat to adversely affect her job status if she does not comply . . . [or] if the offending supervisor abuses his authority over employment decisions to force the victim to endure or participate in the sexual conduct." The EEOC further describes *quid pro quo* cases as those in which a supervisor "has made or threatened to make a decision affecting the victim's employment status." *Id.* at 341.

Although this Court has not yet provided its own definition of the meaning of *quid pro quo* sexual harassment, an application of the ordinary meaning of the term will demonstrate that Ellerth has set forth sufficient substantial evidence in support of factual allegations to defeat Burlington's motion for summary judgment. Black's Law Dictionary defines "*quid pro quo*" as "what for what; something for something. Used in law for the giving of one valuable thing for another . . ." Black's Law Dictionary (6th Ed.) 1248 (West 1990). Substantial evidence supports Ellerth's claim that Slowik explicitly offered such an exchange on at least three occasions, and implicitly left the offer open throughout her employment by Burlington. A jury could reasonably conclude that when Slowik demonstrated his interest in a sexual relationship with Ellerth through his comments and sexual touching in North Carolina, and then told her he could make things at Burlington "very hard or very easy" for her, he was proposing an exchange of one valuable thing for another—an exchange of sex for easy working conditions. Similarly, a jury could reasonably conclude that when Slowik informed Ellerth she was not "loose" enough for a promotion, he was again proposing such a *quid pro quo* exchange. And, a jury could reasonably conclude that when Slowik refused to approve a project unless Ellerth described what she was

wearing and agreed to wear shorter skirts, he was yet again proposing a *quid pro quo* exchange.

III.

TITLE VII LIABILITY FOR *QUID PRO QUO* HARASSMENT IS NOT LIMITED TO CASES IN WHICH THERE ARE ECONOMIC EFFECTS.

Petitioner also argues the proposition that in the absence of economic effects, there can be no Title VII liability for *quid pro quo* harassment. This argument seems considerably hypothetical given the facts of this case, where the plaintiff alleges that she was denied a promotion for a period of time, and then constructively discharged because she resisted a vice-president's sexual advances. But even if the facts supported Petitioner's theory, Petitioner's arguments should be rejected.

A. The 1991 Civil Rights Act Provides A Remedy For *Quid Pro Quo* Sexual Harassment Even In The Absence Of Economic Damages.

Petitioner relies on cases and commentary concerned with the limitations of Title VII actions prior to the Civil Rights Act of 1991, which transformed Title VII from an act providing for equitable relief to one providing both equitable relief and legal damages. Title VII was amended in 1991 to provide for compensatory and punitive damages because Congress had determined that such damages were "necessary to make discrimination victims whole for the terrible injury to their careers, to their mental and emotional health, and to their self-respect and dignity." 42 U.S.C. § 1981a; H.R. Rep. No. 102-40, p. 64 (Apr. 24, 1991).

The House Report on the Civil Rights Act of 1991 recounted the stories of many women who endured years of sexual harassment in the workplace, but were only awarded nominal amounts for their actual economic damages. *Id.* at 66-67. Congress believed that Title VII should compensate victims of sexual harassment for the "terrible humiliation, pain and suffering, and psychological harm" that they experience, whether or not they suffered any economic harm. *Id.* at 66. Nowhere in the legislative history of the 1991 Act did Congress suggest that its intent was to provide such damages only to victims of hostile environment harassment.

As described in more detail below, unfulfilled threats of *quid pro quo* harassment can by themselves cause women considerable emotional distress. In order to recover for damages for this harm under Title VII, as amended by the Civil Rights Act of 1991, sexual harassment plaintiffs need not prove any economic detriment. To impose a requirement of tangible "economic" harm on *quid pro quo* sexual harassment plaintiffs would be to impose a requirement that Congress rejected.

B. Congressional Intent And Public Policy Support *Amicus'* Position That Unfulfilled Threats Violate Title VII Even When There Are No Economic Effects.

If this case were one in which the only acts of harassment were threats, and the threats were neither submitted to nor carried out, petitioner would still be liable for *quid pro quo* sexual harassment. This position is buttressed by the 1990 EEOC Policy Guidance, which describes *quid pro quo* sexual harassment as occurring where the supervisor "has made or threatened to make a decision affecting the victim's employment status." Policy Guidance at 341. The EEOC policy is fully justified by the fact that even the threat that an

employee's job status will be harmed if she does not submit is a serious wrongful act, and a serious abuse of the supervisor's authority to discipline and fire employees. Because it goes to the ability of the employee to make a living, the very heart of the employment relationship, it must be subject to the most diligent protection. It must be distinguished from the standard case of hostile work environment sexual harassment, where the employee's working conditions are affected, but her employment status and earning capacity is not necessarily threatened. If discharge is the "capital punishment" of the workplace, then the threat of discriminatory discharge must be treated as potentially more serious than subjecting employees to discriminatory working conditions.

By focusing on threats made and coercive exchanges attempted, as well as threats carried out, *quid pro quo* sexual harassment is analogous to the tort of assault. An assault occurs either when an attempted battery fails, or when a battery is threatened. Restatement (Second) of Torts, Section 21 (1965). The wrong is in causing the victim to experience apprehension of a battery, even if no battery actually occurs. Here too, even if the threat is never carried out, or an attempt to carry it out fails, the threat alone causes actual harm to its target. She is left continually unsure whether the threat will soon be carried out, whether she will suffer a termination, demotion, or other adverse employment decision, and whether the threat will be renewed, bringing further anxiety and insecurity. Even absent the carrying out of the threat, she has suffered significant compensable harm from discrimination because of sex.

Moreover, from the point of view of the employee, once the threat is made, it is as good as carried out. Many women are afraid to speak out against their supervisor. The supervisor typically has more tenure with the company, more "well placed" friends within the company and often is in a position

that is more secure than that of the victim. Unless she elects the draconian choice of complying with the improper sexual demands, she lives in fear, waiting for the other shoe to drop. If the harasser fires her, she will lose her livelihood. If he prefers to simply let her dangle in the wind, perhaps hoping that in time she will submit, she is never again secure in her employment—the harm has been done. Even if the threat is never exercised, under the Civil Rights Act of 1991 that harm is now compensable. As Judge Flaum found in *Jansen/Ellerth*,

> If the aim is to guard against sexual harassment, there is no justification for distinguishing between those cases in which a supervisor carries through on his threats from those cases in which the employee either submits to the supervisor's demands or in which the supervisor does not act upon his threats. Liability in this situation serves the goal of preventing such abuse from occurring by creating incentives for companies to take steps in hiring and training their supervisors. And while compensation of the victim may be secondary in overall importance to the goal of deterrence, it is undeniable that an employee can be harmed by an unfulfilled *quid pro quo*. A supervisor's unambiguous communication that adverse job action is imminent if sexual favors are not forthcoming causes the employee real emotional strife. An employee who does not submit may well undergo anxiety, distress, and loss of productivity regardless of whether the threat is carried out. Further, holding employers responsible for threats that clearly condition tangible job benefits upon the receipt of sexual favors and result in injury, even if no adverse job consequences follow, is consistent with the fact that the employee who submits to such a threat is afforded a remedy.

Jansen/Ellerth, 123 F.3d 490 at 499-500.

Ellerth's allegations are similar to allegations ruled on by the First Circuit in a case under Title IX,[5] *Lipsett v. University of Puerto Rico*, 864 F.2d 881 (1st Cir. 1988). Dr. Lipsett, a female surgical resident, was sexually solicited by two of her supervisors in the residency program. When she complained to their supervisor, he suggested that a sexual relationship with a supervisor would help her in her career. She never submitted to this implicit threat, but because she resisted their advances they "made [her] life unbearable." *Id.* at 888. Reversing an entry of summary judgment, the court ruled:

> The plaintiff also established a prima facie case of *quid pro quo* sexual harassment by Drs. Rivera and Morales. She claimed that each man implied that she should have sex with him, a demand made even more explicit by the warning issued by Dr. Oben, who told the plaintiff that it was 'characteristic' for a 'low level woman resident to keep a relationship with a high level resident or an attending in order to ease her way through [the program].' The plaintiff further alleged that once it became clear that she would not 'keep a relationship' with either Dr. Rivera or Dr. Morales, they both became unfriendly and even hostile. This series of allegations portrays the very essence of *quid pro quo* harassment.

Id. at 905-906.

Similarly, the Third Circuit makes the point that in those cases in which

> submission to such conduct by an individual is made either explicitly or implicitly a term or condition of an individual's employment . . . a *quid pro quo*

[5] 20 U.S.C.A. § 1681 et seq.

> violation occurs at the time when an employee is told that his or her compensation, etc. is dependent upon submission to unwelcome sexual advances. At that point, the employee has been subjected to discrimination because of her sex [EEOC Guidelines, 29 C.F.R. § 1604.11(a)(1) (1980)] . . . Whether the employee thereafter submits to or rebuffs the advances, a violation has nevertheless occurred. Similarly, there is a violation under subsection (1) even if the employee rebuffs the advances and his or her compensation, terms, conditions, or privileges of employment are not in fact altered, i.e., even if the supervisor does not follow through on his or her threat. The threat is sufficient to constitute 'discriminat[ion] . . . with respect to . . . compensation, terms, conditions, or privileges of employment, because of . . . sex.'

Robinson v. City of Pittsburgh, 120 F.3d 1286, 1296-97 (3rd Cir. 1997).

This Court need look no further than the decision of the District of Columbia Circuit in *Gary v. Long*, 59 F.3d 1391 (D.C. Cir. 1995) and Ellerth's companion case, *Jansen v. Packaging Corporation of America*, 895 F.Supp. 1053 (N.D. Ill. 1995), to appreciate the danger of accepting petitioner's argument that discriminatory threats, if not carried out, are immune from Title VII liability. As in this case, the supervisor in *Gary v. Long* began his harassment by telling Ms. Gary that he could make her job "easier" if she'd have sex with him. When she declined, he, like Slowik, made his subordinate's work life very difficult, threatening her with adverse employment decisions, including termination, bombarding her with sexual solicitations and crude sexual references to her body, and threatening to "get" her for rejecting his advances. Unlike this case, the supervisor ultimately raped Ms. Gary. Yet the D.C. Circuit incredibly found that

there was no *quid pro quo* liability because the supervisor, Mr. Long, did not carry out his threats. *Id.* at 1396. The court also rejected Ms. Gary's hostile environment claim against the employer, and her individual Title VII claim against her supervisor. *Id.* at 1397-99.

The separate district courts in both Ellerth and Jansen relied on the reasoning of *Gary v. Long* in dismissing those causes of action in summary judgment proceedings. In Jansen, plaintiff's supervisor withheld her review for several months. When Ms. Jansen asked him about the overdue review, her supervisor would state while patting his genitals that he "hadn't forgotten" about it. 895 F.Supp. at 1060. Relying on *Gary v. Long*, the district court rejected Ms. Jansen's *quid pro quo* claim because the threats were not carried out and Ms. Jansen "was not harmed in any tangible economic way." *Id.* The court also rejected Ms. Jansen's hostile environment claim. *Id.*

Johnson v. Runyon, 928 F.Supp. 575 (D.Md. 1996) also demonstrates how the petitioner's suggested standard fails to adequately protect employees from the coercive sexual conduct of their employers. In that case, the supervisor made numerous lewd, offensive, and suggestive comments to Ms. Johnson, and repeatedly made sexual advances. *Id.* at 586. He asked her if she was dating another employee, and told her that if she were not then she should be with him. He repeatedly suggested that she should have sex with him, even going to her home several times to make these suggestions. He often stood close to her and inappropriately touched her. After he had attempted to embrace her and she pushed him away, he began a campaign of harassment, including verbal abuse, a low performance rating, and a bad recommendation. *Id.* The court found that she had not stated a *quid pro quo* claim, because she could not show that her refusal had led to a tangible job detriment. *Id.* at 587.

Rushing v. United Airlines, 919 F.Supp. 1101 (N.D.Ill. 1996) is yet another example of the irrational consequences imposed by adopting the reasoning of *Gary v. Long*. In *Rushing*, the plaintiff was subjected to repeated requests for oral sex by a supervisor. *Id.* at 1105. After he refused, Mr. Rushing was assigned less desirable jobs at the worksite and singled out for discipline. *Id.* at 1109. The district court held that Mr. Rushing had not stated a *quid pro quo* claim because he "did not suffer any adverse employment consequences." *Id.* The court also rejected his hostile environment claim. *Id.* at 1108.

Acceptance of petitioner's argument and the holding of *Gary v. Long* would leave an enormous gap in the protections offered by Title VII against discrimination and harassment in the workplace and discourages victims of harassment from coming forward and complaining about their supervisor's harassment. It would encourage predatory supervisors to "rattle their sabers" and threaten their subordinates, safe in the knowledge that as long as they do not actually carry out the threats there will be no liability, unless their behavior is deemed severe or pervasive enough to also constitute an abusive or hostile work environment.

C. Scientific Evidence Demonstrates That Unfulfilled Threats Of Retaliation For Refusing Sexual Advances By Supervisors Cause Serious Harm.

A recent government-commissioned survey of 20,000 women in the armed forces demonstrates that when women are threatened with retaliation for refusing to have sex with their supervisors or co-employees, they suffer very substantial harm regardless of whether the threats are actually carried out. Fitzgerald, L.F., Bergman, M.E. and Hulin,

C.L. *The Harms of Asking: The Psychological and Job-Related Consequences of Sexual Coercion in the Workplace*. (March 26, 1998) <ftp://www.psych.uiuc.edu/pub/share/fitzger> (hereafter "Fitzgerald study"). This evidence demonstrates why it is critical to hold that the threat of *quid pro quo* harassment is itself sufficient to establish a violation of Title VII.

The Fitzgerald study examined two large sets of sexual harassment targets. The first grouping measured the impact of sexual harassment threats when the threats were not carried out, precisely the situation reflected by the question presented by petitioner in this case. This grouping compared three groups: (1) women who had not been sexually harassed, (2) women who had been threatened with negative consequences for not cooperating sexually with a superior or co-worker, but had not actually been subjected to the threatened consequences, and (3) women who had actually experienced the threatened consequences. The study found that those women who were "only" threatened experienced job-related harm, health-related harm, psychological harm, and lowered work productivity when compared with women who had not been sexually harassed. Moreover, it found that the primary harm comes from the threat itself, rather than carrying out the threat; there was no significant difference between those who had "only" been threatened with retaliation and those who had actually suffered retaliation. Job related effects from the threats include (but are not limited to): Lowered satisfaction with work; decreased commitment to the organization; and, interference with work because of emotional and health related problems related to the threats. Threatened women who were not retaliated against suffered severe substantial physical and emotional harm, indistinguishable from those who were retaliated against.

The second grouping of the Fitzgerald study examined women who were subjected to a broad panoply of sexual harassment, answering "yes" to the following descriptions of conduct: a) repeatedly told sexual stories or jokes that were offensive to you; b) made crude and offensive sexual remarks, either publicly (for example, in your workplace) or to you privately; c) made offensive remarks about your appearance, body, or sexual activities; d) made unwanted attempts to establish a sexual relationship with you despite your efforts to discourage it; e) stared, leered, or ogled you in a way that made you feel uncomfortable; g) made you feel like you were being bribed with some sort of reward or special treatment to engage in sexual behavior; h) made you feel threatened with some sort of retaliation for not being sexually cooperative; i) touched you in a way that made you feel uncomfortable; j) made unwanted attempts to stroke, fondle, or kiss you; k) implied faster promotions or better treatment if you were sexually cooperative; l) made you afraid you would be treated poorly if you didn't cooperate sexually. These facts are quite similar to the allegations made by Ellerth in the instant case. The Fitzgerald study found, predictably, that these women suffered job-related harm, health-related harm, psychological harm, and lowered work productivity. It further found that the harm they suffered was once again comparable to the harm experienced by women who were "only" threatened with retaliation for not submitting to sexual demands. Whether we accept Petitioner's or Respondent's factual premise, then, there is significant scientific evidence that women in Ellerth's position are likely to suffer substantial compensable harm from the kind of conduct alleged in this case.

IV.

UNDER THE EEOC'S 1980 DEFINITION OF *QUID PRO QUO* HARASSMENT, ELLERTH HAS PROPERLY SET FORTH THE NECESSARY FACTUAL ALLEGATIONS TO DEFEAT SUMMARY JUDGMENT.

A. Ellerth Has Submitted Substantial Evidence In Support Of The Allegation That Submission To Sexual Harassment Was Made A Term Or Condition Of Her Employment.

As noted above, the EEOC's 1980 Guidelines define *quid pro quo* sexual harassment as occurring "when submission to such conduct by an individual is made either explicitly or *implicitly a term or condition of an individual's employment* . . . (emphasis added)." On the basis of the factual allegations set forth by Ellerth in response to Burlington's motion for summary judgment, a jury would be justified in concluding the following: (1) in conditioning Ellerth's promotion on her being less "arrogant" and more "loose" he conditioned her promotion on her engaging in sexual acts with him; (2) in refusing to approve her special project unless she engaged in sexual banter over the phone with him ["tell me what you're wearing"], or begin wearing short skirts to show him her legs, he conditioned her satisfactory performance of her work on her engaging in sexual activity with him; (3) in informing Ellerth that he could make her job at Burlington "very hard or very easy," depending on whether she submitted to his sexual advances, Slowik conditioned her "easy" employment on her submission to his advances. When she failed to submit, he carried out his threat, making her life "very hard." He made her life very hard by bombarding her with hurtful, offensive, unwanted sexual jokes, comments, innuendoes, and suggestions; by touching her in a sexual manner without her consent; by calling on other Burlington employees to comment on her body; by making sexual comments about

other women to her; and by repeating his demand that she engage in sexual acts as well as sexual conversation with him; finally (4), in making her work at Burlington so "unbearable" that she felt forced to resign, he conditioned her continued employment on her engaging in sexual acts with him.

B. Ellerth Has Submitted Substantial Evidence In Support Of The Allegation That Rejection Of Slowik's Sexual Demands Was Used As The Basis Of Adverse Employment Decisions Made Against Ellerth.

The EEOC's 1980 Guidelines further define *quid pro quo* sexual harassment as occurring "when submission to or rejection of such conduct by an individual is used as the basis for *employment decisions* affecting such individual (emphasis added)." On the factual allegations set forth by Ellerth in response to Burlington's motion for summary judgment, a jury would be justified in concluding that because Ellerth rejected Slowik's demands, Slowik made the following adverse employment decisions against her: (1) he delayed her promotion to sales representative; (2) he refused to approve a special project she was undertaking for a customer; (3) he subjected her to ongoing on-the-job harassment in the form of hurtful, offensive, unwanted sexual jokes, comments, innuendos, and suggestions; he touched her in a sexual manner without her consent; he called on other Burlington employees to comment on her body; he made sexual comments about other women to her; and he repeated his demand that she engage in sexual acts as well as sexual conversation with him. And ultimately (4), he made her work at Burlington so "unbearable" that she felt forced to resign.

V.

UNDER THE EEOC'S 1990 GUIDANCE ON SEXUAL HARASSMENT ELLERTH HAS PROPERLY SET FORTH THE NECESSARY FACTUAL ALLEGATIONS TO DEFEAT SUMMARY JUDGMENT.

A. Ellerth Has Submitted Substantial Evidence In Support Of The Allegation That A Sexually Hostile Work Environment Resulted In Her Constructive Discharge.

In the 1990 EEOC Policy Guidance, the EEOC explained that harassment that begins as hostile work environment harassment might be later transformed into *quid pro quo* harassment. "For example, an employee's tangible job conditions are affected when a sexually hostile work environment results in her constructive discharge." Policy Guidance at 328.

On the factual allegations set forth by Ellerth in response to Burlington's motion for summary judgment, a jury would be justified in concluding that Ellerth submitted her resignation because, as she described in her letter of June 21, 1994, "Ted [Slowik] made my life with Burlington unbearable." This claim is strengthened by the fact that Ellerth regarded Slowik's demand that she describe and change her clothing to satisfy his sexual fantasies as the "straw that broke the camel's back." If the jury so concludes, it may properly conclude that Ellerth was constructively discharged by Burlington in violation of Title VII.

B. Ellerth Has Submitted Substantial Evidence In Support Of The Allegation That Slowik Communicated An Implicit Threat To Adversely Affect Her Job Status If She Didn't Comply With His Sexual Advances.

In the 1990 EEOC Policy Guidance, the EEOC also explained that "a supervisor who makes sexual advances toward a subordinate employee may communicate an implicit threat to adversely affect her job status if she does not comply." Policy Guidance at 328, 329.

On the factual allegations set forth by Ellerth in response to Burlington's motion for summary judgment, a jury would be justified in concluding that Slowik communicated an implicit threat to adversely affect Ellerth's job status if she refused to comply with his sexual demands, by finding: (1) that Slowik's threat that he could make life at Burlington "very hard or very easy" was a threat to make her life at Burlington very hard unless she submitted to his demands, or (2) that Slowik's refusal to approve the special project unless Ellerth engaged in some form of sexual banter over the phone with Slowik carried with it an implicit threat to prevent her from performing her job functions. Given that both these threats were ultimately carried out, this argument is particularly forceful.

C. Ellerth Has Submitted Substantial Evidence In Support Of The Allegation That Slowik Abused His Authority Over Employment Decisions To Force Her To Endure His Sexual Conduct.

In the 1990 EEOC Policy Guidance, the EEOC further describes *quid pro quo* cases as those in which "the offending supervisor abuses his authority over employment decisions to force the victim to endure or participate in the sexual conduct." Policy Guidance at 328, 329.

On the factual allegations set forth by Ellerth in response to Burlington's motion for summary judgment, a jury would be justified in concluding that Slowik used his position as a vice-president in charge of Ellerth's division to abuse the actual authority given him by Burlington to make hiring, promotion, termination and supervisory decisions to force her to endure his sexual conduct. Once he hired her, Slowik informed Ellerth he could make her life at Burlington "very hard or very easy" depending on her compliance with his sexual demands. This statement was undoubtedly true; Slowik could make Ellerth's life at Burlington very hard or very easy, because Burlington granted him extensive authority over her. When Ellerth declined to meet Slowik's demands, he exerted his managerial authority to grant or deny promotions to delay her promotion because she was not sexually "loose." When she rebutted his attempts to engage her in sexual banter ["tell me what you're wearing"] or to wear shorter skirts, he used the authority granted to him by Burlington; he refused to approve projects she needed to perform her job, leading to her decision to resign.

Petitioner Burlington argues that Slowik's abuse of authority was not Burlington's responsibility because the harassment was outside the scope of his employment and committed for his own benefit. But decisions to delay promotions and reject projects were completely within the scope of Slowik's employment; it was this authority that he abused. See, e.g., *Doe v. Samaritan Counseling Center*, 791 P.2d 344 (Alaska 1990) (employer vicariously liable when counselor initiates unauthorized sexual relationship with patient); *Samuels v. Southern Baptist Hospital*, 594 So.2d 571 (La. Ct. App. 1992) (hospital vicariously liable when nursing assistant rapes patient). While Slowik may have been motivated by his own interests, it was also in his employer's interests that he makes decisions about promotions and customer

projects. See Restatement (Second) of Agency, comment to Section 236 (1957) ("the fact that the predominant motive of the servant is to benefit himself or a third person does not prevent the act from being within the scope of employment"). In empowering Slowik with the authority to make decisions altering Ellerth's career with Burlington, Burlington assumed responsibility for any employment decisions Slowik made affecting Ellerth, regardless of whether Slowik's decisions were improperly motivated by Ellerth's failure to submit to his inappropriate sexual demands.

CONCLUSION

In the instant case, Kimberly Ellerth was subjected to both threats and retaliation for her refusal to submit to her supervisor's sexual demands, and that retaliation included both economic and non-economic consequences. Therefore, the question presented by the petitioner is completely unrelated to the actual facts of the case, and certiorari was improvidently granted. If this Court determines that the writ of certiorari should not be dismissed, *amicus* has demonstrated that *quid pro quo* harassment under Title VII includes threats by supervisors that are not carried out, and that liability is not limited to cases where the victim only suffers "tangible economic detriment." This is supported by EEOC guidelines and guidance, scientific evidence, Congress's amendment of Title VII in 1991 to include damages for non-economic harm, and the overall purposes of Title VII. Based on these definitions of *quid pro quo* harassment, Ellerth has set forth the necessary factual allegations to defeat summary judgment.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

BURLINGTON INDUSTRIES, INC.,
Petitioner,

v.

KIMBERLY B. ELLERTH,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF THE RESPONDENT

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF THE RESPONDENT

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), a federation of 75 national and international unions with a total membership of approximately 13,000,000 working men and women, files this brief *amicus curiae* with the consent of the parties as provided for in the Rules of this Court.[1]

[1] No counsel for a party authored this brief *amicus curiae* in whole or in part, and no person or entity, other than the *amicus curiae*, made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The Question Presented in this case is whether a claim of *quid pro quo* sexual harassment in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*, is made out where a supervisor threatens a subordinate employee that she will suffer adverse employment consequences if she does not submit to sexual advances, but does not carry out those threats (either because she submits, because she sues before the threat can be carried out, or because he was bluffing). The legal significance of this question to this case is far from clear.

Two kinds of Title VII cases that differ in their focus and patterns of proof have come to called sexual harassment cases. The first, the *"quid pro quo"* category, is essentially a variety of individual Title VII disparate treatment cases, such as *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and its progeny, in which the plaintiff challenges a discrete adverse employment decision on the ground that the decisionmaker was motivated, at least in part, by sex, race, or other criteria impermissible under Title VII. The second, the "hostile environment" category, centers on the imposition of discriminatory working conditions and requirements.

The standard covering the latter category of cases, established by this Court in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), recognizes, that discriminatory behavior need not always be repetitive in order to create a working environment that impermissibly discriminates on the basis of sex. In particular, where a woman capitulates to her supervisor's sexual demands to avoid threatened job consequences, the requirement that she perform sexual services to maintain her employment status is almost surely a discriminatory working condition, without more. And, where a supervisor threatens such job consequences if the employee does not capitulate but has not yet carried out the threat, the impending threat is, as the

District Court found in this case, likely to pervade the woman's working environment whether repeated or not.

That the *quid pro quo*/hostile environment categorization is helpful in isolating the elements of proof of two kinds of Title VII cases does not mean, however, that this pigeonholding is helpful for any other purpose. In particular, while the lower courts in this case *presumed* that this bifurcation also governs the question whether an employer is liable for illegal sexual harassment by a supervisor, there is *no* reason that should be so.

Rather, as in Title VII law generally, the employer vicarious liability question in sexual harassment cases should turn on the nature of the authority vested in the supervisor and the connection between that authority and the illegal harassment. That the harassment itself is not motivated by an intention to forward the employer's interests is of no more relevance for sexual harassment cases than it is where the actionable motivation is the personal racism or misogyny of a supervisor with authority to control a given aspect of the supervised employees' worklives that results in the supervisor's discriminatory treatment of those employees.

Because the respondent in this case made out a sufficient hostile environment case, relying in part on threats made by a supervisor acting from discriminatory motives and with authority to carry out those threats, and in part on discriminatory harassing conduct by that same supervisor while carrying out his supervisory authority, the question whether she also made out a *quid pro case* sexual harassment case is irrelevant.

Although the foregoing analysis is sufficient to decide this case, we also address briefly Judge Posner's alternative "company act" analysis in his opinion in the *en banc* proceedings in this case. As we show, that analysis is inconsistent with *Meritor* in that it entirely ignores even the broadest outlines of traditional agency law; is based on the premise that federal sexual harassment law is solely concerned with detering harassment and not at all with

providing compensation to harassment victims, an assumption that cannot be squared with either Title VII law generally or the specific purposes of the 1991 Congress in adding a compensatory damages remedy; and, by substituting a negligence standard for an agency standard in supervisor sexual harassment cases, will involve the courts unnecessarily, and without any legislative standards, in the details of sound management practices.

ARGUMENT

I. THE LEGAL SIGNIFICANCE OF THE QUESTION PRESENTED.

1. Petitioner Burlington Industries, Inc. asks this Court to decide whether on the facts of this Title VII case—in which a male Burlington manager made a female employee's acquiescence in his sexual advances a condition of her job performance—a claim of "*quid pro quo* sexual harassment" is, or is not, made out.

Petitioner is, of course, master of its own Question Presented. But, at the same time, it is fair and proper—and in this instance we believe highly productive—to begin answering that question by inquiring into its legal significance.

The term "*quid pro quo* sexual harassment," after all does not appear in Title VII. One therefore cannot divine from the statute itself what an affirmative or negative answer to the question Petitioner presents entails in legal consequences, nor does the statute provide any textual clues as to the correct answer.

To be sure, as we show below, asking and answering the question Petitioner presents *may* well be a convenient way to categorize at the most general level the standards governing, and the modes of proving, whether the plaintiff has been subjected to discriminatory working conditions under Title VII where a particular recurrent fact pattern is present.

But it is our position that asking and answering the *quid pro quo* question Petitioner poses serves no other

useful role in applying Title VII. Rather, we submit, the principles for determining, in any particular case, whether or not an employing entity is liable to the plaintiff for discrimination on the basis of gender of the kind that has come to be called sexual harassment is in the end conceptually distinct from the principles used to distinguish the substantive class of cases usually called *quid pro quo* sexual harassment cases from other sexual harassment cases.[2]

2. It is useful to begin recounting the various roles the concept of *quid pro quo* sexual harassment has taken on as this case has developed. Doing so goes a long way toward isolating the relevance of the categorization question Petitioner asks this Court to answer as if that question is the dispositive legal question in this case.

(a) The plaintiff in this case, Kimberly B. Ellerth, filed a Title VII complaint alleging generally that she was "inappropriately touched and sexually harassed in her place of employment." Pet. App. 219a. When the defendant, Burlington Industries, Inc., moved for summary judgment, Ellerth presented deposition testimony and declarations setting forth (1) that Ted Slowik, the vice president of sales and marketing of the Burlington division in which Ellerth was employed, repeatedly, during the fourteen months Ellerth was employed by Burlington, made her the object of sexually-charged remarks and subjected her to sexual innuendo; touched her inappropriately; and objected that she was "arrogant" and not "loose" enough;

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[2] The American Federation of Labor and Congress of Industrial Organizations filed an *Amicus Curiae* Brief in Support of Petitioner ("Amicus Br.) in *Faragher v. City of Boca Raton*, No. 97-282. *Faragher*, on our view of the properly applicable employer liability principles, is closely analogous to this case on that issue. Rather than repeating the analysis set out in that brief a second time, throughout this AFL-CIO *amicus* brief we summarize the pertinent points made there, refer the Court to the appropriate pages of our *Faragher* brief for further elucidation, and then provide whatever additional explanation is occasioned by the particular facts of this case or by the briefs filed by Petitioner and its *amici* in this case.

and (2) that Slowik admitted that he had considered refusing Ellerth a promotion because she was not "loose" enough, and at least three other times indicated that unless Ellerth met his sexual specifications her employment situation at Burlington would suffer. In the latter regard, on two occasions, just before Ellerth resigned, Slowik refused to approve the creation of specific fabric samples she needed to serve a customer because Ellerth would not gratify his sexual interest by wearing shorter skirts, and did so at a time when Ellerth was being criticized for not providing prompt, satisfactory customer service, a criticism that contributed to her resignation decision. Jt. App. 10-14, 81-85, 88-99.

The District Court viewed this evidence as sufficient, if believed by the jury, to demonstrate that Slowik's conduct was both "discriminatory" and "severe and pervasive enough to alter the conditions of Ellerth's employment," applying the "hostile environment" standard for determining Title VII discrimination based on sex set out by this Court in *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 65 (1986) and reiterated both in *Harris v. Forklift Systems*, 510 U.S. 17, 22 (1993) and, earlier this month, in *Oncale v. Sundowner Offshore Services*, —— U.S. ——, 118 S. Ct. 998 (March 4, 1998).

In so holding, the District Court stressed in its factual analysis that Slowik's express "threats" to visit adverse employment consequences on Ellerth for non-acquiescence bolstered her claim that his behavior was "severe" enough to create discriminatory working conditions. Pet. App. 266a; *see also* Pet. App. 280a ("the hostile work environment to which Ellerth was subjected was created and maintained, in part, by Slowik's *quid pro quo* insinuations"); Pet. App. 264a ("It is very important to recognize . . . that embedded in Slowik's harassment of Ellerth is a *quid pro quo* proposition . . . which the jury could reasonably find pervaded her employment at Burlington. It would not be hard to conclude that every effort toward

achievement that Ellerth made at Burlington was tainted by Slowik's threat.")

The District Court then went on to address the categorization question that has become talismanic in Title VII sexual harassment law and that forms the core of the question Petitioner presents to this Court for decision: The District Court maintained that "We do not mean to suggest that Ellerth has advanced a claim of *quid pro quo* harassment." Pet. App. 264a, n.10. "She has not," said the District Court, because Ellerth did not claim that Slowik had "actually withheld tangible employment benefits as a result of her failure to submit to his sexual overtures." *Id.*[3]

(b) The District Court's approach is both sensible and consistent with this Court's precedents so long as it is taken as a description of two different recurrent proof patterns demonstrating actionable disparate treatment based on sex. The first rests on a showing that a particular advense employment action by a supervisor was impermissibly motivated by a subordinate's response to discriminatory sexual demands. The second rests on a showing that a supervisor, by his manner of carrying out some aspect of his supervisory authority, has "created an abusive working environment" that is "permeated with discriminatory intimidation, ridicule, and insult." *Harris v. Forklift Systems, supra,* 510 U.S. at 21.

The first type of claim—denominated by the District Court as "*quid pro quo*" harassment, following the common usage in recent judicial opinions—is essentially indistinguishable, both conceptually and as to manner or mode of proof, from other Title VII disparate treatment

[3] We note that this carefully worded statement covers over the facts that, on the evidence, a jury might properly have concluded (1) that while Slowik did not discriminatorily "withhold" a benefit, he did discriminatorily delay one (Ellerth's promotion); and (2) that Slowik did in fact make discriminatory job-related decisions not to approve the production of a sample that Ellerth needed for a customer.

challenges to specific, individual employment decisions adversely affecting a plaintiff. In enacting Title VII "Congress . . . forbid employers to take gender into account in making employment decisions," including "the selection, evaluation, or compensation of employees." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239 (1989) (plurality opinion); *see also id.*, at 265 (O'Connor, J., concurring) ("Congress considered reliance on gender or race in making employment decisions an evil in itself."). Because "Title VII eliminates certain bases for distinguishing among employees while otherwise preserving employers' freedom of choice" regarding employment decisions generally (*id.* at 239 (plurality opinion) *quoted in McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 361 (1994)), disparate treatment Title VII cases of this kind center upon determination of the decisionmaker's "mental processes" (*United Postal Service Bd. of Governors v. Aikens*, 460 U.S. 411, 416 (1983)), and upon the link between those mental processes and the final decision (*see Price Waterhouse v. Hopkins, supra*). And, because employer decisionmakers are unlikely to announce the discriminatory basis for their decisions, such cases usually require the drawing of inferences from circumstantial evidence regarding the factors motivating the decision. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993).

Where a plaintiff contends that an employment decision was influenced by the fact that she rejected the sexual advances of an employer decisionmaker, her case challenges that decision as one that impermissibly "[took] gender into account in making employment decisions." *Price Waterhouse v. Hopkins, supra*, 490 U.S. at 239 (plurality opinion): Had she not been a woman, the decisionmaker would not have conditioned her employment security upon engaging in sexual behavior, and would not have penalized her for refusing to do so. The proof differs from non-sexual harassment individual disparate treatment

cases only in that the plaintiff in a *quid pro quo* sexual harassment case would ordinarily have to prove in some manner the sexual proposition and rejection. Aside from that, such cases are identical to other Title VII cases challenging discrete decisions concerning employment matters on the basis that the decisionmaking process was infected by impermissible gender considerations.[4]

The second kind of sex harassment pattern of proof—denominated a "hostile environment" claim in recent common judicial parlance—focusses not on a discrete hiring, promotion, discharge or other similar employment decision but on the imposition of discriminatory working conditions and requirements. "The very fact that discriminatory conduct [is] so severe *or* pervasive that it create[s] a work environment abusive to employees because of their race, gender, religion or national origin offends Title VII's broad rule of workplace equality." *Harris v. Forklift Systems, supra,* 510 U.S. at 22 (1993) (emphasis supplied). This very general standard, which applies whenever the claim is that the employee is being subjected to a discriminatorily abusive working environment, can be met by a wide range of abusive discriminatory conduct. The single constant is that the plaintiff must show that "members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." *Oncale v. Sudowner Offshore Services, Inc., supra,* 118 S. Ct. at 1002. As this Court emphasized in *Oncale,* that showing can be made through various "evidentiary route[s]," as long as "the plaintiff . . . prove[s] that the conduct at issue was

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[4] As this case suggests, a sexual advance need not be a request for sexual intercourse; supervisors may demand less intrusive forms of sexual accommodation or titillation and still penalize a woman for non-compliance. At some point then, the distinction between sexual harassment of this kind and impermissible sexual stereotyping of the kind at issue in *Price Waterhouse—viz.*, the requirement that women employees exhibit stereotypically "femine" behaviors in the workplace—merge. *See* AFL-CIO *Faragher v. Boca Raton Amicus* Br. at pp. 5-7.

not merely tinged with offensive sexual conduct, but actually constituted "*discrimina*[*tion*] . . . because of . . . sex." *Id.* (emphasis in original).

While the factual circumstances that meet this very general standard vary widely, we would expect that over time some rules of thumb will develop regarding certain frequently recurrent courses of conduct, establishing that such courses of conduct are both discriminatory on the basis of sex and severe or pervasive enough to create abusive working conditions. Indeed, the current case suggests two such categories:

First, where there is an explicit, unwelcome, credible demand by a male supervisory or managerial representative of the employer that a female employee engage in sexual intercourse or other intimate sexual behavior or else lose concrete employment benefits, and the employee capituates rather than refusing and endangering her livelihood, the *Meritor/Harris/Oncale* standard would, it appears, be met, without more. As *Oncale* observes, in such a situation, "the inference of discrimination is easy to draw . . . , because the challenged conduct . . . involves explicit proposals of sexual activity" and "it is reasonable to assume that those proposals would not have been made to someone of the same sex." 118 S. Ct. at 1002. The requirement that women but not men must engage in sexual behavior as one of the women's job requirements in order to keep the same job and earn the same salary is certainly a seriously "disadvantageous . . . condition[] of employment". *Id.* And the invasion of privacy, imposition of intimacy, and compromise of one's own personal moral values involved in linking employment security with such sexual submission is "severe" and "abusive," whether "pervasive" or not. *Harris v. Forklift Systems, supra,* 510 U.S. at 21.

Second, as the District Court in this case recognized, where a supervisor explicitly, or by direct implication, threatens to adversely affect a subordinate's employment security, compensation, or status unless she satisfies his

sexual demands, the "discriminatory intimidation" (*Harris v. Forklift Systems, supra,* 510 U.S. at 21) created by being required to work under such a threat for any appreciable time period will often be sufficiently "severe" to "create an abusive working environment," standing alone (*id.*).[6] Whether that is so or not may turn on the credibility and specificity of the threat, the length of time the threat impends, and the nature of the sexual conduct the supervisor is demanding.

In particular, an unfulfilled threat, while pending, can be "pervasive" without being restated. Until the threat is revoked directly or by lapse of time, the employee is faced each day with the decision whether to capitulate in order to avoid a future employment-related injury at the hands of the harassing supervisor; and this is so even if the threat itself is never repeated.

Moreover, even if consistently adamant in her refusal, the employee is likely to experience the workplace as discriminatorily hostile while the threat impends: One who has been told that her efforts at her job tasks, even if exemplary, will *not* be rewarded on the same terms as those of her fellow employees is likely to experience the threat, standing alone, as "detract[ing] from [her] job performance, discourag[ing] [her] from remaining on the job, [and] keep[ing] [her] from advancing in [her] career[]" (*Harris v. Forklift Systems, supra,* 510 U.S. at 22), at least until it becomes clear, if it does, that the threat will not be carried out.

(c) The distinction between "*quid pro quo*" and "hostile environment" patterns of proof, then, is at bottom a utilitarian means of summarizing two different ways plain-

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[6] As *Oncale* points out, "harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex." 118 S. Ct. at 1002. Where there is no inference of sexual desire, though, issues concerning discriminatory threats and possible submission are unlikely to arise. We therefore concentrate in the text on situations in which the harassment *is* based on "sexual desire."

tiffs seek to prove gender-based employment discrimination. The distinction facilitates the effort by judges and litigants to refine the general prohibitions of Title VII so that the law can be applied with greater coherence and predictability. But the cognitive advantage of this system of categorization is lost if it obscures the deeper truth that sexual harassment cases are simply one of the many kinds of individual disparate treatment gender-based discrimination cases, and that "[t]he central focus in [such a] case . . . is always whether the employer is treating 'some people less favorably than others because of their . . . sex. . . .'" *Furnco Construction Co. v. Waters*, 438 U.S. 567, 577 (1978).

Thus, while categorization and systematization can facilitate legal decisionmaking by isolating factors likely to be determinative in cases that resemble each other, such categorization, like other aids to "evaluat[ing] the evidence . . . as it bears on the critical question of discrimination" can also become "rigid, mechanized or ritualistic," in a way that impairs rather than aids the decisionmaking process. *Furnco Construction Co. v. Waters, supra*, 438 U.S. at 577. In particular, categorization of cases according to certain criteria is of no aid in answering legal questions *different* from those that led to the categorization in the first place, and as to which it is *not* those criteria—but *others*—which are critical in the applicable legal analysis.

The District Court decision in this case is illustrative. That decision is, at points, so focused on the *quid pro quo*/hostile environment distinction that the ultimate Title VII question—whether Burlington is to be absolved of responsibility for the gender-based discrimination in working conditions created by the actions of Slowik, a vice president of one of Burlington's divisions—becomes lost. The District Court proceeded on the premise that this case—and the ultimate employer Title VII liability issue it poses—had to be fitted into a rigid bi-polar *quid pro quo*/hostile environment legal world even though its facts are at neither

pole. The truth of the matter is that Slowik's creation of discriminatory working conditions involved the kinds of threats to the plaintiff's employment security that are an integral part of cases in which a plaintiff challenges a discrete employment decision as motivated by her refusal of sexual favors. The dilemma that truth poses, as the District Court saw the matter is this:

> [T]he hostile work environment to which Ellerth was subjected was created and maintained, in part, by Slowik's *quid pro quo* insinuations. *Quid pro quo* harassment, unlike hostile environment harassment, has generally been treated as giving rise to strict liability on the part of the employer. . . . Thus, we must consider whether the strict liability standard should apply in a case such as this where there is a *quid pro quo* component to the hostile work environment. [Pet. App. 280a.]

And the District Court responded by concluding that *because* this case is fundamentally focussed on discriminatory working conditions, "[t]o apply a *quid pro quo* [strict liability standard] under these facts would amount to the tail wagging the dog." Pet. App. 284a.

By and large, the myriad opinions of the Court of Appeals judges issued on *en banc* consideration of this case similarly approach the emloyer liability issue posed here by confounding the categorization of cases according to the kinds of wrongful acts shown in making out a substantive Title VII claim with the categorization of cases according to the actor's role within the company hierarchy that goes to determining whether the company as an employer is legally responsible for the discrimination alleged and should compensate the victim for her injury. *See, e.g.*, Pet. App. 17a (Flaum, J.) ("[d]efining an actionable *quid pro quo*, of course, is central to the liability standard"); *id.* at 30a (Cudahy, J.) ("distinguish[ing] the two kinds of harassment claims makes sense" in determining employer liability issues); *id.* at 154a-155a (Marion, J.) (stressing the importance of "retain[ing] the distinction

between hostile environment and quid pro quo harassment, and . . . impos[ing] a consistent standard of liability . . . in cases of hostile environment harassment no matter whether the harasser is a supervisor or co-worker."); *compare id.* at 178a-179a (Wood, J.) (criticizing the majority for "mak[ing] the employer's liability for a supervisor's action depend on the artificial distinction between '*quid pro quo*' and 'hostile environment' harassment" because that approach "conflates two distinct inquiries, what counts as discrimination for purposes of Title VII and when must the employer answer for it . . . Nowhere does [Title VII] suggest that the question of who speaks for the employer depends on the type of discrimination . . . . at issue").

II. EMPLOYER LIABILITY IN TITLE VII SEXUAL HARASSMENT CASES.

1. Outside the sexual harassment context, employer liability in Title VII cases has always been understood as turning on the generic question whether an individual authorized to act for the employing entity is acting within the area of the authority delegated to him by the entity in carrying out the complained-of discrimination, and not on the particular kind of discriminatory action that individual engaged in.[6] That the employing entity did not sanction the particular action that violated Title VII, or did not forbid that kind of action, has never been considered relevant to employer liability under Title VII.

In this respect, Title VII law is of a piece with modern agency law generally. Thus, the fact that an employing entity does not authorize—and indeed prohibits—sexual harassment is no more relevant to its employer "vicarious liability" for sexual harassment than is the fact that modern employers generally ban other forms of illegal discrimination by their supervisors and managers is to the entity's liability for those other forms of discrimination.[7]

[6] *See* AFL-CIO *Faragher v. Boca Raton Amicus* Brief at pp. 14-15.

2. While general agency law in the past tended to hold companies liable only where a company actor was acting in part with the intention of forwarding the company's business interests, modern agency law has tended often (but not always) to view actions with a "personal element" in their motivation as attributable for liability purposes to an employing entity where the employee's "entire course

[7] There is a tendency in the Title VII case law to refer to the inquiry into which activities by its supervisors and managers an employing entity is answerable for as an inquiry into whether there is to be "strict" liability or only liability for the "employer's *own* wrong." Issues of the liability of a business company, or other organizational entity, for injury caused by the individuals the entity hired to carry out its affairs, however, are not true strict liability issues at all as defined in the tort law of, e.g., product liability.

Product liability dispenses with the need to show wrongful action either in the sense of badly motivated action or of negligent acts or omissions. That is *not* true under any theory of employing entity Title VII liability.

Employing entities in the vast majority of circumstances interact with other entities and individuals only through individuals employed, or engaged, by the entity. It makes no sense to talk as if making the entity responsible for injuries caused by action of the individuals acting for it is tantamount to holding the entity liable in damages although the entity has done nothing wrong. Rather, in a case such as this one, *someone* connected with the entity *has* intentionally acted in a discriminatory fashion made culpable by the statute—here, Slowik—and the liability question is whether that person is sufficiently connected to the entity with respect to the action he took that the entity should properly be recognized as the wrongdoer.

While somewhat metaphysical, the conceptual difference seems to us to be a critical one, which is why we use the term "vicarious liability" rather than "strict liability" throughout our argument. We do so for want of a better common term and even though "vicarious liability"—a term that comes out of the master/servant law and originally refered to a master who was a single individual not an entity that constitutes a "legal person"—also has connotations of imputing to someone responsibility for *someone else's* actions, rather than of determining who the relevant "someone" is.

of conduct was inextricably intertwined with his service to his employer." *Field v. Sanders*, 29 Cal. 2d 834, 840 (1947).[8]

Moreover, to the degree that modern agency law is not uniform in this latter regard, the fundamental purpose of Title VII, and of employment discrimination laws generally—forwarding "[t]he broad, overriding interest shared by employer, employee and consumer in efficient and trustworthy workmanship assured through fair . . . and neutral employment [practices]" (*McDonnell Douglas Corp. v. Green, supra*, 411 U.S. at 800)—commends a rule analogous to the one adopted in *Field v. Sanders* and similar cases.

Delving into the deep wellsprings of human behavior to the degree that a distinction between personally-motivated and business-motivated discrimination under

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[8] *See AFL-CIO Faragher v. Boca Raton Amicus* Brief, pp. at 19-20. In the AFL-CIO *Faragher* Brief, we gave some examples of the more modern trend in agency law regarding situations in which the injury is directly caused by personally motivated behavior but the behavior was both prevalent enough that the employer could have expected it and occurred as the employee was in the course of carrying out tasks within the scope of the employee's authority. Those examples included damage caused by smoking on the job, whether authorized or not. The smoking is obviously a purely personal pleasure. But employers do not necessarily avoid liability by fractioning off the personal behavior that directly caused the injury from the larger course of employment-related conduct in which the employee was engaged on the employing entity's behalf at the same time. And, employers are generally responsible for injuries caused by drunk employees, even where it is clear that had the employee not been drinking for his own pleasure no injury would have occurred. Similarly, cases like *Field v. Sanders*, *supra*, and *Carr v. Wm. C. Crowell Co.*, 28 Cal. 652 (1946), found employer liability for intentional torts of violence where an employee while engaged in activity on behalf of the employer became angry for reasons having no apparent connection with advancing the employer's interest and injured the plaintiff.

Title VII would demand taxes the litigation system to—and perhaps beyond—its limits. And, such a distinction would insulate from liability those discriminatory employment practices motivated by the most instinctive and irrational, and therefore least tractable, hatred and prejudice. Protecting from the reach of Title VII decisions made by hard-core misogynists (and racists), willing to compromise their employer's overall, long-term interest in attracting and retaining the best workers in order to satisfy their personal prejudices, surely does not forward the "purpose of Congress . . . to *eliminate* those discriminatory practices and devices which have fostered [sexually] stratified job environments." *McDonnell Douglas Corp. v. Green, supra*, 411 U.S. at 800 (emphasis supplied).[9] This ap-

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[9] If it were relevant to employer liability under Title VII whether the supervisor's discrete injurious actions (as opposed to the broader course of conduct within which they occurred) were motivated by an intention to advance the employer's interests rather than personal interests, employer liability for the one form of sexual harassment as to which there *has* been a consensus that such liability is proper would be eliminated. For supervisors who refuse to hire, discharge, or refuse to promote employees who do not comply with their sexual demands are surely not laboring under the illusion that they are forwarding the employer's business interests rather than their own personal interests in so doing.

That this is so does not demonstrate that the consensus regarding employer liability that has developed in the classim *quid pro quo* harassment cases is mistaken. Rather, the lesson is that the "employer interest" criterion for determining whether a supervisor's actions are within the scope of his authority has *not* been applied to such cases precisely because those cases are an integral part of the larger class of Title VII disparate treatment employment decisions cases (in which, as we have seen, an employer is liable for discriminatory decisionmaking even if the decisionmaker is doing nothing more than expressing, through his actions, his purely personal prejudice and preferences).

That perceived structural identity has aided the lower courts in understanding that if Title VII's purposes are to be met, employer liability in sexual harassment cases that take the *quid pro quo* form must be imposed without regard to the probable fact that the supervisor discriminated to please himself rather than to forward the employer's interests. Against that background, it is wholly im-

proach has no more to commend it as a device to insulate employers from responsibility for the creation by a sexist supervisor of sexually discriminatory working conditions than as a device to insulate employers from liability for discriminatory refusals by a racist supervisor to hire African Americans with superior qualifications and recommendations.

3. Under the general, modern "scope of authority" approach to employer liability properly applicable under Title VII generally—and under sexual harassment law particularly—the determination whether the employing entity is liable to a plaintiff for discriminatory actions by a supervisor should turn, then, on first delineating the nature of the supervisor's authority and responsibilities on behalf of the employer, and on thereafter determining whether the supervisor's discriminatory actions involve, at least in part, the area of responsibility entrusted to the supervisor by the employing entity.

The result of applying those scope of authority standards will be that employers will generally be liable where a supervisor entrusted with making certain kinds of discrete employment decisions is influenced by a sexually-related reason in making such a decision (including the reason that the affected employee spurned sexual advances).[10] Where, however, the proof pattern concerns

proper to bring in, like a *deus ex machina*, "personal motivation" as an insuperable agency law reason for precluding vicarious employer liability in discriminatory work environment sexual harassment cases simply because those cases differ in other respects, but *not* in the nature of the supervisor's motivation, from traditional Title VII individual disparate treatment cases.

[10] This is not to say that an employer will always be responsible for injuries caused by a supervisor who retaliates against an employee for spurning sexual advances, even where those advances took place at work. A supervisor who slashes the tires on an employee's car parned on the street, or makes after-hours harassing telephone calls to the employee's home, is acting outside the authority delegated to him by the employer. Put another way, while in one

discriminatory working conditions and conforms to the hostile environment model, "employers [will not] *always* [be] automatically liable for sexual harassment by their supervisors" (*Meritor Savings Bank, supra*, 477 U.S. at 72 (emphasis supplied)), although in many situations (including this one) the employer will be.[11] In particular,

sense it is true that the narrow *quid pro quo* kind of sexual harassment case will almost always result in employer liability, that is because the category is *defined* as one in which the supervisor makes and carries out threats to use employer-delegated authority to coerce sexual compliance, whereas other categories of sexual harassment cases are not so defined.

[11] The employer and their *amici* in this case and in *Faragher* have read *Meritor* as if it stated that employers can never, or almost never, or rarely, or less than half the time, be vicariously liable for sexual harassment by supervisory personnel. In fact, as the quotation in the text indicates, the holding of *Meritor* regarding vicarious employer liability is avowedly exceedingly narrow, and, in context, served the office of ruling out the singular D.C. Circuit stnadard that had been applied in that case—a standard that went beyond modern agency law in that it made the supervisor's scope of authority irrelevant and imposed employing entity liability by reason of the supervisor's title alone. *See* 477 U.S. at 73 *rejecting Vinson v. Taylor*, 753 F.2d 141, 151 (D.C. Cir. 1985).

Under the D.C. Circuit *Meritor* standard, unwelcome sexual advances by a supervisor at a private party, and harassment by a department head of an employee not in his department and over whom he wields no employing entity conferred authority would become the basis for suits against the employer.

Similarly, such an automatic standard would assess employer liability for discriminatorily abusive working condition where the harassing behavior was perpetrated by an individual (such as Lieutenant Silverman in the *Faragher* case) who had only a minor supervisory authority as opposed to an individual (such as Chief Terry in *Faragher*) who was charged with general supervision of the workplace.

The scope of authority limitation on the liability of employing entities for acts by supervisors, which would preclude vicarious liability under such circumstances, therefore *does* "place some"—indeed, significant—"limits on the acts of employees for which employers under Title VII are to be held responsible." *Meritor*, 477 U.S. at 72.

where, as in *Faragher*, the harassing supervisor has primary day-to-day responsibility to direct and exercise supervision over the harassed employee or where, as here, the harassing supervisor invokes authority over work processes and personnel decisions to perpetrate an abusive workplace, there will be employer vicarious liability although, for purposes of determining whether there is actionable discrimination by the harassing supervisor, the case falls within the hostile environment proof pattern.

3. On the above analysis, the proper answer to the Question Presented by Petitioner in this case—"Whether a claim of *quid pro quo* harassment may be stated . . . where the plaintiff employee has neither submitted to the sexual advances of the alleged harasser nor suffered any tangible effects on the compensation, terms, conditions, or privileges of employment as a consequence of a refusal to submit to those advances" (Brief for Petitioner Burlington Industries, Inc., at (i))—is (1) "No", and (2) that this negative answer makes absolutely no difference to the outcome of this case, because (a) Ellerth has submitted facts sufficient to survive summary judgment using the hostile environment proof pattern (and might have done so, given the explicit threats, on a considerably lesser showing of repeated harassing behavior than shown here), and (b) the *quid pro quo*/hostile environment dichotomy does not determine the employer liability question.

In our view, there is nothing more this Court need decide fully to answer all issues fairly encompassed within the Question Presented here.

4. Given the foregoing analysis and the conclusions we draw, we would be derelict if we did not note that the *per curiam* opinion below, summarizing the ensuing separate opinions by various judges, indicates that our answer to the Question Presented *does* preclude Ellerth from going forward with this case, because she has waived her claim based on discriminatory working conditions caused

by supervisory sexual harassment. But it was, once again, the same assumption of a rigid, bifurcated legal world of sexual harassment litigation that led the *per curiam* opinion to state, erroneously, that Ellerth "expressly waived" her hostile environment claim in her briefs. Pet. App. 6a.

In fact, Ellerth explicitly relied upon and argued for affirmance of the District Court's ruling that the hostile environment—that is, discriminatory working conditions—claim could go forward. *See* Appellant's Reply Brief in the Court of Appeals, at 12 ("B. DEFENDANT IS LIABLE FOR HOSTILE WORK ENVIRONMENT SEXUAL HARASSMENT BY SLOWIK BECAUSE SLOWIK WAS AN AGENT OF DEFENDENT IN CREATING THIS ENVIRONMENT."); *id.*, n.3 (relying on the District Court's decision and her district court brief to show that "Ellerth . . . raised a genuine issue of material fact that the sexual harassment she was subjected to was severe or pervasive enough to create a hostile work environment.") And, on further inspection, the various *en banc* opinions issued by the Seventh Circuit reveal that the majority there actually concluded that Ellerth chose not to advance or rely on a negligence standard for employer liability (because she believed (as do we) that the proper employer liability standard for a discriminatory work environment case involving supervisory behavior of the kind in this case is based on the normal agency law principles governing the liability of employing entities for the acts of supervisors), *not* that Ellerth chose not to advance or rely on her discriminatory work environment claim. *See* Ellerth Ct. of App. Reply Br., 11; *see* Pet. App. 28a (Flaum, J.) (Ellerth "disavows any argument that liability should be imposed because of employer negligence"); *id.* at 59a ("Ellerth explicitly waived negligence as a ground for Burlington's liability"); *id.* at 206a-207a (Wood, J.) ("attempting to pigeonhole harassment cases" led to confusion about what Ellerth waived).

III. THE "COMPANY ACT" THEORY.

The parties and *amici* have treated this case as one raising the issue whether there can be employing entity vicarious liability in an inchoate threat situation such as this one, without regard to whether such a case is substantively measured by the same standard governing *quid pro quo* cases in which the threat is carried out or by a different standard.

In particular, Petitioner in large part embraces Judge Posner's proposal in his opinion on *en banc* consideration, that there can be no employer vicarious liability by reason of supervisor threats to take concrete adverse action in the form of firing the employee, denying her a promotion, etc., if she does not submit to sexual advances unless the threat is carried out. Under that "company act" proposal, if the plaintiff submits to the supervisor's sexual demands because of explicit threats to use his employer-conferred powers against her, or if the supervisor never carries out (although does not revoke) the threat, the plaintiff can only recover any damages from, or obtain any injunctive relief against, the employer by proving that the employer as an entity was negligent. Pet. App. 50a-55a. While we do not regard the propriety of that employer liability proposal as properly within the *substantive* categorization question on which *certiorari* was granted (particularly since the Petition for Writ of Certiorari did contain a second question, explicitly raising an employer liability issue, on which *certiorari* was not granted, *compare* Pet. at i (raising as a second question "Whether strict liability is the proper standard of liability under Title VII for *quid pro quo* sexual harassments") with 66 L.W. 3490 (limiting *certiorari* grant to the first question presented)), in this concluding section of our brief we nonetheless address the "company act" issue briefly.

Judge Posner proposes that for purposes of determining employing entity vicarious liability a distinction be drawn between situations in which a supervisor does carry

out a "company act" detrimental to an employee who spurned his sexual advances and situations in which the supervisor does not do so, whether because the employee capitulates to the demands, or because the employee brings suit on the threat before the supervisor has the opportunity to act on his threat, or because the supervisor was bluffing and did not in fact act on the threat when he had the opportunity to do so.

First, in making this proposal, Judge Posner essentially recognized—by providing an extended discourse on the irrelevance of established agency law to the present issue—that his proposed distinction does not comport with basic agency law principles. We have explained above in large part why that is so. As that explanation indicates, we agree with Judge Posner that rigid adherence to the minutia of *Restatement of Agency II* is not useful. In particular, the *Restatement II* is out of step with many of the most thoughtful modern agency cases on the question of whether personal-predilection-based, as compared to employer-business-needs based, discriminatory motivation takes a supervisor discriminatory act out of Title VII. And, in any event, that question must ultimately be answered—in our view in the negative—as a matter of Title VII employing entity liability law and not of pure *Restatement II* law.

At the same time, agency law, at least at its broadest, consensus level, is where *Meritor* directed the inquiry to begin. For Title VII does, as *Meritor* stressed, use the term "agent." And this Court's general rule, applied in *Meritor*, is that term used in statutes which have a traditional legal meaning are to be given that meaning, absent a good reason otherwise. *Varity Corp. v. Howe*, 116 S. Ct. 1065, 1073 (1996); *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322 (1992).

Equally to the point, established law does provide at least *some* useful, generally accepted content to the concept of agency for vicarious liability purposes—primarily, that whether an agent's actions are attributable to the

employer turns not on substantive law or on what realm of the employer's operations are involved but on whether the putative agent has employer-conferred authority which covers the area of operations within which the agent acts in violation of law. To draw a line between supervisor discrimination that works an actual economic loss on an employee—Judge Posner's so-called "company act" category, also known generally as the "*quid pro quo*" harassment category—and discrimination that involves supervisor discrimination that creates an actual abusive working environment therefore cuts into the problem in a substantive way that is entirely at odds with the basic precepts of agency law.

Second, in determining "as an original matter . . . what the best regime of libility would be" (Pet. App. 43a) for cases involving sexual harassment by supervisors, Judge Posner's departure point is that the *only* pertinent Title VII consideration is deterring sexual harassment in the workplace, and that providing compensation to the harassment victim for her injuries is not part of the Title VII regime. Pet. App. 44a.

Judge Posner's premise in this regard is squarely inconsistent with this Court's Title VII jurisprudence generally. *See McKennon v. Nashville Banner Publishing Co., supra*, 513 U.S. at 358 ("Deterrence is one object of [employment discrimination] statutes. Compensation for injuries caused by the prohibited discrimination is another."); *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 764 (1976) (making individual discriminatees whole for their the injuries caused by unlawful employment discrimination is "one of the central purposes" of Title VII); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975) ("It is also the purpose of Title VII to make persons whole for injuries suffered on account of unlawful employment discrimination.").

Indeed, Judge Posner's suggestion that Title VII is not concerned with providing compensation for the victims of sexual harassment because "sexual harassment does not

usually bring about a significant change in the victim's wealth" (Pet. App. 44a), flies in the face of the Civil Rights Act of 1991, which added compensatory damages to Title VII in large part to meet the concern that under the original statute victims of sexual harassment were not being fully compensated for their injuries. *See* Pub. L. 102-166 (Nov. 21, 1991) § 3 (the first of the three purposes of the Act is "to provide appropriate remedies for intentional discrimination and unlawful harassment in the workplace"); H.R. Rep. No. 102-40(I), 102nd Cong., 1st Sess. 14 (1991) (a purpose of the Act is to "provide monetary remedies for victims of intentional discrimination"); *id.*, at 64-65 ("Monetary remedies are necessary to make discrimination victims whole for the terrible injury to their careers, to their mental and emotional health, and to their self-respect and dignity."). The examples contained in the Committee Reports, which focussed on sexual harassment, confirm that providing meaningful compensation to victims of sexual harassment was a major purpose of the 1991 Act. H.R. Rep. No. 102-40(I), *supra*, at 66-69 (Headed "Making Victims of Intentional Discrimination Whole for Injury to Their Careers, Mental and Emotional Health, and Self-respect and Dignity" and containing excerpts from testimony by several victims of sexual harassment concerning the impact of the harassment on them and the inadequacy of the then-extant Title VII remedies in making them whole for their injuries).[12]

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[12] Because Congress plainly *intended* to provide compensation for mental and emotional injuries, we are not sure of the pertinence of Judge Posner's posit that "an award of damages in these case is not *primarily* designed to protect the victim's standard of living." Pet. App. 44a. We note, nonetheless, that the compensatory damages remedy added to Title VII in 1991 was meant to cover nonbackpay economic costs, such as medical expenses (H.R. Rep. No. 102-40(I), *supra*, at 66-67), and that Congress also recognized that the "terrible humiliation, pain and suffering, psychological harm and related medical problems" was likely to cause "other economic losses," including inability to work (*id.*).

The fact that compensation for the victims of unlawful sexual harassment *is* central to the Title VII scheme puts the question of employer liability in a very different posture than if Title VII's focus were purely on deterrence. Judge Henry Friendly, in an agency law case decided long before sexual harassment generated a cause of action, explained why:

> It is not at all clear . . . that expansion of liability [to situations in which the employee was acting in connection with his employment but forwarding his own rather than his employer's purposes] . . . will lead to a more efficient allocation of resources. . . . [since] a more efficient allocation can only be expected if there is some reason to believe that imposing a particular cost on the enterprise will lead it to consider whether steps would be taken to prevent a recurrence of the accident. . . . [And, while it] is true, of course, that in many cases the plaintiff will not be in a position to insure, and so expansion of liability will, at the very least, serve respondeat superior's loss spreading function. . . . the fact that the defendant is better able to afford damages is not alone sufficient to justify legal responsibility. . . .
>
> [An efficiency] policy analysis thus is not sufficient to justify this proposed expansion of vicarious liability. This is not surprising since respondeat superior . . . rests not so much on policy grounds . . . as in a deeply rooted sentiment that a business enterprise cannot justly disclaim responsibility for accidents which may fairly be said to be characteristic of its activities. [*Ira S. Bushey & Sons v. United States*, 398 F.2d 167, 171 (2nd Cir. 1968).

And, since " 'men [and women] do not discard their personal qualities when they go to work' " (*id.*, *quoting Hartford Accident & Indemnity Co. v. Cardillo*, 112 F.2d 11, 15 (2nd Cir.), *cert. denied*, 310 U.S. 649 (1940)), employers who invest supervisors with authority over employees in their working lives cannot absolve themselves from responsibility when, in the course of exercising that authority, the supervisor injures the employee in the manner that the Title VII ban on discriminatorily abusive working conditions is intended to prevent.

Third, even if one focusses on the deterrence rather than the compensation goal of Title VII, Judge Posner's insistence that employers should be liable only for their "own" negligence where there has been no "company act" is difficult, if not impossible to justify, for two reasons:

In the first place, Judge Posner's "company acts"/discriminatory working conditions" distinction rests on his perception that employer monitoring of the former, but not the latter, is feasible. But, as discussed above a "company act" sexual harassment case is simply one variety of an "individual disparate treatment" challenge to an employment decision, of the kind underlying the *McDonnell Douglas* line of cases. And, the last of those cases, *St. Mary's Honor Center v. Hicks*, termed "highly fanciful" the notion that an employing entity can sufficiently monitor all decisions by supervisors with authority to make personnel decisions so as to be aware of their mental reasons for making decisions as they did. 509 U.S. at 514 & n.5.[13] Precisely because that is so, and contrary to Judge Posner, the discriminatory working conditions that make a hostile environment are, if anything, *more* likely to be visible in the workplace and knowable by more senior employer supervisors and managers than the mental processes of employer decisionmakers regarding personnel decisions.

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[13] It is worth noting that *St. Mary's* takes it as a given that the employing entity *would* be liable for the discriminatory motives of its "hiring officer," without more, if those motives were adequately proven. 509 U.S. at 513-14. There was no suggestion that this liability could have been avoided by clear directions to that officer to make decisions on the merits rather than on racial grounds, or by proving that the "hiring agent" was an out-and-out racist and discriminated because he, personally, was unwilling to work with African Americans even if they were the best employees available for the employer's purposes.

Additionally, and critically, Judge Posner's "negligence" standard of employer liability in discriminatory working conditions cases is more, not less, likely to lead to protracted litigation and free-floating judge and jury decision-making than the normal "scope of authority" vicarious liabiilty agency standard.

Title VII, of course, does not contain any reference to a negligence standard; rather, the statute on its face forbids employers to "discriminate," (42 U.S.C. § 2000e-2(a)(1)), a term that usually bespeaks intentional acts. *See also* 42 U.S.C. § 2000e-5(g) (providing relief under Title VII for intentional unlawful employment practices). And Title VII certainly does not lay out the factors to be taken into account to determine whether an employer has been negligent with respect to supervisor discriminatory conduct.

Thus, as Judge Posner acknowledges, to apply his negligence standard the courts will have to develop their own standards regarding what a reasonable employer would do to prevent supervisor discrimination. Pet. App. 50a. Such standards will have to set prescriptions for employer harassment policies, including such matters as whether the protections accorded from retaliation are meaningful, whether the dissemination of the policy to employees and supervisors was adequate, and whether in practice the policy provides prompt and adequate relief.[14]

[14] As we noted in our *Faragher Amicus* Brief (at p. 23, n.8), under a vicarious liability standard the existence of an effective employer policy forbidding sexual harassment by supervisors and providing employees with a means of complaining to hiring authorities about such harassment can in many circumstances protect employees from liability for harassment. As we noted there an effective harassment policy provides an employer with possibility of remedying harassment before it becomes actionable, is relevant in assessing constructive discharge claims, may decrease compensatory damages on a "mitigation" theory, and would be relevant to punitive damages.

Additionally, that an employee does not take advantage of a widely-disseminated, effective policy but complains only after the

Additionally, since, as Judge Posner recognizes, employers can be negligent by failing to act on actual or constructive knowledge of harassment (Pet. App. 45a), courts will have to develop and apply standards elucidating the level of authority within a company that actual knowledge must reach in order to trigger a responsibility to act. *See Young v. Bayer Corp.*, 123 F.3d 672 (7th Cir. 1997), a companion case to *Ellerth*, that undertakes precisely that inquiry recognizing that it is necessitated by the Seventh Circuit's negligence standard for hostile environment cases generally.

Finally, with regard to "constructive knowledge" in this context it is plain from the lower court cases that the determination that an employer "should know" of pervasive harassment is a normative, not cognative, determination. And, for many business reasons, employers may choose to maintain decentralized management systems, in which headquarters personnel do not involve themselves in the day-to-day affairs of geographically or functionally distinct branch offices or departments (such as those involved in *Meritor* or *Faragher*). For judges and juries to decide that the employer "should have" known what was happening on a day-to-day basis in such departments or

fact would certainly be relevant as a credibility matter in determining whether the harassing incidents ever occurred.

Further, where harassment is by co-employees rather than supervisors, an employer cannot be vicariously liable because the areas of employment decisions and establishing and monitoring of working conditions are not within the co-employees scope of employment. At the same time, an employer who provided no means of remedying pervasive or severe harassment by such employees may be held to have established discriminatory working conditions. That being so, employers are likely to maintain poliices discouraging harassment, and are unlikely to except harassment by supervisors from such policies.

For all these reasons, the notion that a vicarious liability standard for supervisory working condition harassment will lead to less rather than more effective employer policies against harassment is an empty one.

offices is necessarily to involve judges and juries in corporate structural matters that are more usually addressed in corporate board rooms and schools of business administration.

In short, along with its other defects, a negligence standard for supervisor sexual harassment, whether that harassment takes the form of a "company act" or not, cuts against the general principle that Title VII preserves employer autonomy with regard to carrying out its obligations under the statute because "[c]ourts are generally less competent than employers to restructure business practices, and unless mandated by Congress they should not attempt it." *Furnco Construction Co. v. Waters, supra*, 438 U.S. at 578.

CONCLUSION

For the reasons stated above, the judgment of the United States Court of Appeals for the Seventh Circuit, en banc, should be affirmed.

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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1997

BURLINGTON INDUSTRIES, INC.

Petitioner,

v.

KIMBERLY B. ELLERTH

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

BRIEF *AMICUS CURIAE* IN SUPPORT OF RESPONDENT KIMBERLY B. ELLERTH

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March 30, 1998

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QUESTION PRESENTED FOR REVIEW

I. Whether a claim of quid pro quo sexual harassment may be stated under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, et seq., where the plaintiff employee has neither submitted to the sexual advances of the alleged harasser nor suffered any tangible effects on the compensation, terms, conditions or privileges of employment as a consequence of a refusal to submit to those advances.

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No. 96-779

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1997

BURLINGTON INDUSTRIES, INCORPORATED

Petitioner,

v.

KIMBERLY B. ELLERTH

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

BRIEF *AMICUS CURIAE* IN SUPPORT OF RESPONDENT KIMBERLY B. ELLERTH

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

I. STATEMENT OF *AMICUS CURIAE* INTEREST AND INTRODUCTION

The Rutherford Institute is a non-profit organization established in 1982 and based in Charlottesville, Virginia,

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** The parties have consented to the filing of this brief. Counsel for The Rutherford Institute authored this brief in its entirety. No person or entity, other than the Institute, its supporters, or its counsel, made a monetary contribution to the preparation or submission of this brief.

providing legal services nationwide in defense of civil and religious liberties. The Institute has appeared numerous times before this Court on such matters, most recently as counsel of record for Respondent in *Arkansas Educational Television Comm. v. Forbes,* Sup.Ct. No. 96-779 (October term, 1996)..

II. SUMMARY OF ARGUMENT

In the wake of the peaceful anti-segregation protests in the late 1950's and early 1960's, *e.g.*, restaurant sit-ins and bus boycotts, the 1964 Civil Rights Act was enacted to do what the Reconstruction era Fourteenth Amendment could not completely do - "eliminate all badges of slavery" - because the Amendment applied only to governmental agents, not private actors. Title VII of the Act was intended to achieve equality in employment opportunities through the eradication of discriminatory barriers in the workplace.

Title VII renders it unlawful for any public or private employer with more than fifteen employees to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges or employment, because of such individual's race, color, religion, sex, or national origin. . . ."[1]

The bill creating Title VII was originally targeted at racial discrimination, and the prohibition on gender-based discrimination was added on the floor of the House.[2] Consequently, virtually no legislative discussion of the intent and scope of the prohibition on gender discrimination exists, and this area of law has been almost entirely developed by the

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[1] 42 U.S.C. Secs. 2000e-2(a)(1).

[2] *See* 110 Cong. Rec. 2577-2584 (1964), and discussion in *Meritor Savings Bank, F.S.B. v. Vinson*, 477 U.S. 57, 63-64 (1986).

courts.[3]

Prior to 1986, courts differed on whether sexual *harassment* in the workplace was a form of sex discrimination outlawed by Title VII. The U.S. Supreme Court put the debate to rest in 1986 in *Meritor Savings Bank v. Vinson*,[4] by holding that sexual harassment claims could be brought under Title VII. The Court did so by first observing that sexual harassment was a type of gender-based discrimination: "Without question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor "discriminate[s]" on the basis of sex.[5] The Supreme Court next rejected the argument that in passing the 1964 Civil Rights Act, Congress was only concerned with "tangible losses of an economic character" and not "purely psychological aspects of the workplace environment."[6] The Court stated that "[t]he phrase, 'terms, conditions, or privileges of employment' evinces a congressional intent '"to strike at the entire spectrum of disparate treatment of men and women"' in employment."[7] The Court concluded:

> Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual

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[3] *Id.*

[4] 477 U.S. 57 (1986).

[5] 477 U.S. 64.

[6] *Id.*

[7] *Id.* (cites omitted), quoting *Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702, 707, n. 13 (1978).

> equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or a woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets.[8]

The Supreme Court continued its broad and liberal reading of Title VII recently in *Oncale v. Sundowner*, __ U.S. __ (March 4, 1998), Sup.Ct. No. 96-568 (1998 WL 88039) by holding that Title VII's prohibition on discrimination "because of sex" extends to harassment between members of the same sex. "[M]ale-on-male sexual harassment was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Id.* The Court is now called upon to determine whether supervisor threats of retaliation, although unfulfilled, constitute an "arbitrary barrier to sexual equality at the workplace" in contravention of Title VII. *Meritor*, *supra*, at n. 8.

Amicus curiae The Rutherford Institute respectfully submits that the better reasoned rule among the Circuit Courts of Appeal imposes strict liability upon employers for the acts of their supervisory employees which amount to *quid pro quo* sexual harassment, without requiring a showing of tangible job detriment suffered by the employee. This approach is consonant with the language and intent of the proscriptions

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[8] *Id.* at 67, quoting *Henson v. Dundee*, 682 F.2d 897 (11th Cir. 1982).

against gender discrimination of Title VII, and offers the Court the opportunity to, in the words of the *en banc* Eighth Circuit Court of Appeals, "bring order to the chaotic case law in this important field of practice"[9] by clarifying that one rule of liability - strict liability - pertains when the harasser is the employee-victim's supervisor.

III. ARGUMENT

A. IMPOSING STRICT LIABILITY ON EMPLOYERS FOR QUID PRO QUO HARASSMENT OF SUPERVISORS WITHOUT REQUIRING A SHOWING OF TANGIBLE DETRIMENT TO THE EMPLOYEE IS THE RULE MOST CONSISTENT WITH THE LANGUAGE AND INTENT OF TITLE VII.

For analytical purposes, courts determine liability of employers according to two types of sexual harassment, *quid pro quo* harassment and hostile work environment harassment. The predominate method for analyzing *quid pro quo* and hostile work environment harassment causes of action is to analyze each cause of action separately, applying strict liability in *quid pro quo* causes and agency principles to the hostile environment causes.[10]

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[9] *Ellerth v. Burlington Industries, Inc.*, 123 F.3d 490, 494-95 (1997).

[10] This method of analysis is exemplified in *Caribbean v. Columbia University*, in which the Second Circuit began by holding that the *quid pro quo* harasser subjects his employer to strict liability. 14 F.3d 773, 777 (2nd Cir. 1997). The court further held that only the plaintiff's hostile

(continued...)

Insofar as no two broad categories can suffice to encompass all workplace scenarios, it may be more helpful to regard the Court's intent in *Meritor* to treat them as the predominant paradigms of harassment, rather than as discrete categories. As courts have frequently noted, "Hostile environment and *quid pro quo* harassment causes of action are not always clearly distinct and separate,"[11] and many cases require analysis of the employee's claims under both standards.

Quid pro quo harassment occurs "where specific benefits of employment are conditioned on sexual demands by the victim's supervisor." *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437, 1443 (10th Cir. 1997). In a *quid pro quo* harassment case, a supervisor either expressly or impliedly makes an employee's access to her tangible job benefits contingent upon acquiescence to the harasser's sexual demands. *See Karibian v. Columbia Univ.*, 14 F.3d 773, 777 (2d Cir.); "*Quid pro quo* sexual harassment occurs when an employer conditions, explicitly or implicitly, the receipt of a job benefit or a tangible job detriment on the employee's acceptance or rejection of sexual advances." *Reinhold v. Commonwealth of Va.*, No. 96-2816, 1998 WL 45247, at 12 (4th Cir. Feb. 6,

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[10](...continued)
work environment claims were to be analyzed under common law principles of agency as directed by *Meritor*. Id. at 779-780. *See also, Torres v. Pisano*, 116 F.3d at 625, at 633-634 (2nd Cir. 1997); *Harrison*, 112 F.3d at 1443-1448; *Gary v. Lon* 59 F.3d 1391, 1395-1399 (D.C. Cir. 1995); *Kauffman v. Allied Signal*, 970 F.2d 178, at 181-187 (6th Cir. 1992); *Kotcher*, 957 F.2d 59, 62-63 (2d Cir. 1992); *Hicks v. Gates*, 833 F.2d 966, 1413-1418 (10th Cir. 1991).

[11] *Carrero v. New York City Hous. Auth.*, 890 F.2d 569, 579 (2d Cir. 1989).

1998). Thus, in a *quid pro quo* cause of action, the relevant inquiry is "whether the supervisor has linked tangible job benefits to the acceptance or rejection of sexual advances." *Id.* Sec. 778. In other words, the issue is whether the "supervisor used the employee's acceptance or rejection of his advances as the basis for a decision affecting the compensation, terms, conditions or privileges of the employee's job." *Id.* In contrast, in a hostile work environment sexual harassment situation, the "sexual conduct has the purpose or effect of unreasonably interfering with an individual's work or performance or creating an intimidating, hostile, or offensive working environment." *Meritor*, 477 U.S. at 65. The Court in *Meritor* declined to adopt a rule that would render employers automatically liable for sexual harassment by their supervisors in a hostile work environment cause of action, instead directing lower courts to consult agency principles for guidance on the issue of employer liability.[12] The Court reasoned that because Title VII's definition of "employer" includes any "agent" of the employer, Congress intended to apply agency principles when determining the scope of an employer's liability for sexual harassment. *Id.* Thus, the Court suggested that the issue of employer liability be determined with reference to agency principles. *Id.* However, the Court did not specify whether the lower courts should refer to agency principles only in hostile work environment cases or in *quid pro quo* cases as well. This issue has been left for the circuit courts to determine.

In response, courts treat these two categories of

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[12] *Id.* at 472-73. The *Meritor* Court recommended that the lower courts refer to sections 219-237 of the Restatement of Agency. These sections are found in Chapter Seven, Topic Two, Title B of the Restatement entitled, "Liability of Principal to Third Persons - Liability for Authorized Conduct or Conduct Incidental Thereto - Torts of Servants." Restatement (Second) of Agency Secs. 219-237 (1958).

harassment differently when determining the standard for an employer's liability. *Harrison*, 112 F.3d at 1443. "In cases involving *quid pro quo* harassment, courts routinely hold, with little or no discussion, that the employer is 'strictly liable' for the supervisor's wrongful conduct." *Id.* "There is little controversy regarding the effect of *quid pro quo* harassment by supervisors; in *quid pro quo* harassment cases, courts readily impose liability on the employer without regard to the agency issues." David B. Oppenheimer, *Exacerbating the Exasperating: Title VII Liability of Employers for Sexual Harassment Committed by their Supervisors*, 81 Cornell L. Rev. 66, 71 n. 32 (1995); *see also* Anita Bernstein, *Treating Sexual Harassment with Respect*, 111 Harv. L. Rev. 445, 496 (1997). It is predominantly in hostile environment harassment cases that courts follow *Meritor*'s directive and engage in lengthy analyses regarding common law agency principles.

The nature of *quid pro quo* harassment requires a context of a harassing act or acts committed directly by or at the direction of a supervisory employee, rather than a co-worker. A supervisor's clear threat (whether implied or explicit) to withhold job benefits or impose job detriments on an employee depending upon her accession to his sexual desires is an arbitrary barrier to sexual equality in the workplace, and should thus be considered to be within the scope of evils Title VII was designed to "strike at the heart of . . ." *Meritor*, 477 U.S. at 64. An examination of the cases in this area leads to the clear conclusion that employees suffer harm on the job upon the making of such demands, not upon their response. A clear *quid pro quo* demand immediately impairs the victim-employee's motivation and poisons her workplace environment, thereby affecting the "terms and conditions" of her employment.

The Court in *Harris v. Forklift Systems*, 510 U.S. 17, 22

(1993), affirmed that compensation for subjective emotional distress is recoverable under Title VII in the context of hostile work environment claims by recognizing that "A discriminatorily abusive work environment, even one that does not seriously affect employees' psychological well-being, can and often will detract from employees' job performance, discourages employees from advancing in their careers." *Id.* at 370-71. For this reason, numerous cases relied upon by Petitioner and its *amici* for their assertion that tangible job detriment is required for a finding of *quid pro quo* harassment are inapposite because they predate the 1991 amendments to Title VII, when only equitable relief such as back pay and reinstatement -- but not noneconomic compensatory damages for emotional distress - was available to prevailing plaintiffs. *Highlander v. KFC*, 805 F.2d 644 (6th Cir. 1986); *Jones v. Flagship International*, 793 F.2d 714 (5th Cir. 1986); *Sparks v. Pilot Freight Carriers*, 830F.2d 1554 (11th Cir. 1987); *Chamberlin v. 101 Realty*, 915 F.2d 777 (1st Cir. 1990); *Spencer v. GE*, 894 F.2d 651 (4th Cir. 1990); *Hicks v. Gates Rubber Co.*, 833 F.2d 1406 (10th Cir. 1987). "In that context, it arguably made sense to require some realized adverse action. Now that emotional damage is compensable, the scope of *quid pro quo* should encompass clear unfulfilled threats that cause serious emotional harm." *Jansen*, 123 F.3d at 488 (plurality opinion).

The Court's unwillingness in *Harris* to rule out the possibility that one particularly egregious act of harassment could create a hostile work environment[13] seems predicated on this same principle. Several of the Circuits Courts have also

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[13] 510 U.S. at 23 (whether environment is hostile can be determined only by examination of all circumstances, including, *inter alia*, "the frequency of the discriminatory conduct").

recognized this view. *E.g., Tomka v. Sailor Corp.*, 66 F.3d 1295, 1305 (2d Cir. 1995)("even a single incident of sexual assault sufficiently alters the conditions of the victim's employment and clearly creates an abusive work environment for purposes of Title VII liability."); *Bohen v. City of East Chicago*, 799 F.2d 1180 (7th Cir. 1986) ("[a]s a general matter, a single discriminatory act against one individual can amount to intentional discrimination for equal protection purposes);" *Reid v. O'Leary*, No. CIV.A. 96-401 (GK)(D.C.Cir. 1996)(1996 U.S.Dist. LEXIS 10627).

In light of these principles, the issue of whether *quid pro quo* liability should be found absent tangible job detriment should be examined from the standpoint of the employee whom Title VII primarily seeks to protect. When a demand for submission to sexual favors is made, the employee-victim has two choices, to submit or resist (reporting the threat may be considered a form of resistance). However, she has no way of knowing what the outcome of her course of action will be in either case, since power over the terms and conditions of her employment remains solely in the hands of her supervisor in either case. The harassing supervisor's authority places a broad range of potential rewards and punishments at his disposal. Rewards for submission may take the form of any number of the following, or a pattern or combination of them: more lenient job assignments or working hours; enhanced performance reviews; and advances in position, compensation or title. *E.g., Karibian v. Columbia Univ.*, 14 F.3d 773, 777 (2d Cir. 1994)(A supervisor's intertwining of a request for the performance of sexual favors with a discussion of actual or potential job benefits or detriments in a single conversation); *Jansen v. Packaging Corp. of America*, 123 F.3d 490 (7th Cir. 1997)(Supervisor says to his secretary, "I haven't forgotten your [performance] review, it's here on my desk," while patting

his crotch). Likewise, punishments may take the form of a number of potential negative consequences, or a pattern or combination of them: burdensome increases in the employee's workload or changes in the employee's tasks; detrimental performance reviews; and demotions, suspensions or stripping of titles and responsibilities. *E.g., Nichols v. Frank*, 42 F.3d 503 (9th Cir. 1994)(Supervisor in post office repeatedly demanded and obtained oral sex from a deaf-mute postal employee over a period of six months; plaintiff submitted because she feared losing her job and did not know how she could get another); *Bryson v. Chicago State University*, 96 F.3d 912 (7th Cir. 1996)(Plaintiff university professor alleged that Provost made sexual overtures toward her, threatening, "you had better do what I say or you're going to be sorry.").

Abusive supervisors rarely exhibit isolated instances of either the "carrot" or the "stick" approach; typically, a combination of both are used, as the employee alternately submits and resists depending upon the severity of the consequences and the degree of control the supevisors wields. The abusive supevisor is not concerned with advancing the employee-victim's career, but with self-gratification; consequently, he may withhold promised favors even after the employee submits, or may arbitrarily punish the employee despite her acquiescence in his demands. In some cases, he may even permit the resisting employee to advance because he fears the potential consequences that retribution may pose to his own career prospects. *E.g, Jansen v. Packaging Corp. of America, supra; Ellerth v. Burlington Industries, Inc.*, 123 F.3d 490, 494-95 (1997). The employee-victim, on the other hand, remains powerless in all situations. She cannot predict the outcome of her submission or resistance to her supervisor's demands, which remains in his hands alone; and she cannot "enforce" a *quid pro quo* "contract" for career favors procured

by her submission. It is the threat of withholding job favors or imposing retaliation that places the employee in the position of making this Hobbesian choice, and consequently it is these tyes of demands that the provisions of Title VII should be construed to "strike at the heart of".

B. THE PREVALENT AND BETTER-REASONED RULE AMONG THE CIRCUIT COURTS IMPOSES STRICT LIABILITY UPON AN EMPLOYER FOR ACTS OF A SUPERVISOR THAT AMOUNT TO *QUID PRO QUO* SEXUAL HARASSMENT.

An analysis of the standard for *quid pro quo* liability should begin with the recognition that, regardless of the rationale employed, the Crcuit Courts of Appeal that have addressed the issue have held, by and large, that employers are strictly liable for *quid pro quo* sexual harassment. *See Meritor*, 477 U.S. at 75 (J. Marshall, concurring)("[E]very Court of Appeals that has considered this issue has held that sexual harassment by supervisory personnel is automatically imputed to the employer when the harassment results in tangible job detriment to the subordinate employee."). *See also Torres v. Pisano*, 116 F.3d 625, 633 (2d Cir. 1997); *Davis v. City of Sioux City*, 115 F.3d 1365, 1367 (8th Cir. 1997); *Harrison v. Eddy Potash, Inc.*, 112 F.3d at 1443; *Gary v. Long*, 59 F.3d 1391, 1395-96 (D.C. Cir. 1995); *Martin v. Cavalier Hotel Corp.*, 48 F.3d 1343, 1351 n. 3 (4th Cir. 1995); *Nichols v. Frank*, 42 F.3d 503, 513 (9th Cir. 1994); *Karibian, supra,* 14 F.3d at 777; *Sauers v. Salt Lake County*, 1 F.3d 1122, 1127 (10th Cir. 1993); *Kauffman v. Allied Signal, Inc.*, 970 F.2d 178, 185-86 (6th Cir. 1992); *Chamberlin v. 101 Realty, Inc.*, 915 F.2d 777, 785 (1st Cir. 1990); *Carrero v. New York City Hous.*

Auth., 890 F.2d 569, 579 (2d Cir. 1989); *Steele v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311, 1316 (11th Cir. 1989); *Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554, 1564 n. 22 (11th Cir. 1987); *Highlander v. KFC Nat'l Management Co.*, 805 F.2d 644, 648 (6th Cir. 1986); *Henson v. City of Dundee*, 682 F.2d 897, 909-910 (11th Cir. 1982).

The rationale by which courts apply *respondeat superior* to establish *quid pro quo* liability varies. *See* Rachel E. Lutner, *Employer Liability for Sexual Harassment: The Morass of Agency Principles and Respondeat Superior*, 1993 U. Ill. L. Rev. 589, 602 (1993). Some courts call employer liability in the *quid pro quo* context a form of *respondeat superior*, while others rely on the Restatement of Agency principles. *See, e.g., Nichols, supra*, 42 F.3d at 514 ("Under traditional agency principles, the exercise of such actual or apparent authority gives rise to liability on the part of the employer under a theory of *respondeat superior.*"); *Chamberlin, supra*, 915 F.2d at 784 (describing as one of the elements of a viable *quid pro quo* harassment claim that, "respondeat superior has been established").

Corts utilizing the *respondeat superior* rationale hold that employers are liable for the *quid pro quo* harassment of their supervisors because the "supervisor is deemed to act on behalf of the employer when making decisions that affect the economic status of the employee. From the perspective of the employee, the supervisor and the employer merge into a single entity." *Karibian*, 14 F.3d at 780; *See also Kotcher v. Rosa and Sullivan Appliance Center, Inc.*, 957 F.2d 59, 62 (2d Cir. 1992); *Carrero*, 890 F.2d at 579; *Steele*, 867 F.2d at 1316 (explaining that an employer is strictly liable for the supervisor's *quid pro quo* harassment because the supervisor, "by definition, acts as the company"). Similarly, in *Highlander*

v. KFC Nat'l Management Co., the Sixth Circuit held that *respondeat superior* is used to hold an employer strictly liable for the conduct of supervisory employees having plenary authority to hire, fire, promote, and discipline. 805 F.2d at 648. In other words, the strict liability stems from the harasser's authority, not from his actions. Lutner, *supra*, at 602 n. 110.[14]

Other courts have referred to common law agency principles set forth in the Restatement in their brief analyses. Section 219 of the Restatement of Agency reads, "(1) A master is subject to liability for the torts of his servants committed while acting in the scope of their employment. (2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless: (d) ... he was aided in accomplishing the tort by the existence of the agency relation." Restatement (Second) of Agency Secs. 219(1) & (2)(d) (1958). Before *Meritor*, the Eleventh Circuit in *Henson v. City of Dundee* referred to Restatement Section 219(2)(d) to explain its rationale for subjecting the employer to strict liability for *quid pro quo* harassment. 682 F.2d at 910 n. 21. The court reasoned that because the supervisor used the means furnished to him by the employer to extort sexual consideration from the employee, he was "aided in accomplishing the tort by the existence of the agency relation." *Id.*, quoting Restatement (Second) Agency Sec. 219(2)(d). Accord *Harrison v. Eddy Potash, Inc., supra*, 112 F.3d at 1443 (strict liability rule justified as "presumably rests[ing] upon the fact that the supervisor was acting within the scope of his actual or apparent authority when he

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[14] *But cf. Chamberlin v. 101 Realty, Inc.*, in which the First Circuit analyzed the strict liability rule under a slightly different theory, holding that *respondeat superior* stems from a finding of tangible job detriment to the harassed employee because an employer is strictly liable for the actions of its supervisors that constitute sexual harassment. 915 F.2d at 785; Lutner, *supra*, at 602, n. 110.

committed the harassment, . . . or because the supervisor 'was aided in accomplishing the [harassment] by the existence of the agency relation," *see* Restatement (Second) of Agency Sec. 219(1) & (2)(d); *Bouton v. BMW of North America*, 29 F.3d 103, 106-07 (3d Cir. 1994) ("Scope-of-employment liability is often involved in *quid pro quo* cases because the supervisor has used his authority over the employee's job to extort sexual favors. Without the agency relationship, *quid pro quo* harassment would be impossible."); *Davis v. City of Sioux City, supra*, 115 F.3d at 1368. *Martin v. Cavalier Hotel Corp., supra* at 1353; *Nichols, supra*, 42 F.3d at 514.

Notably, even in applying agency principles to hostile work environment claims pursuant to *Meritor*, several Circuit Courts impose strict liability upon the employer for harassment caused by supervisory employees. *See* Bernstein, *supra*, at pp. 599-600.

Where strict liability of the employer is established, no showing of tangible job detriment is necessary. Proof of tangible job detriment has generally been required by the Circuit Courts only where the issue before the court is whether threats and conduct of a supervisor may be attributed to the employer under agency principles. *E.g., Gary v. Long, supra.* Rather than examining the record for some form of objective job detriment suffered by the employee, however subtle, *e.g., Bryson v. Chicago State*, 96 F.3d 912 (7th Cir. 1996)(removal from faculty committee sufficient tangible detriment), the more workable rule would assume strict liability for the employer where the harassing employee had authority to alter the terms and conditions of the employee's workplace, and evidence is adduced that he used that authority to demand submission to sexual desires as a condition of receiving favors or avoiding sanctions.

C. CLARIFYING THAT THE STANDARD FOR SEXUAL HARASSMENT LIABILITY UNDER TITLE VII DEPENDS UPON THE SUPERVISORY CAPACITY OF THE HARASSER, AND NOT UPON THE NATURE OF THE CONDUCT ALLEGED, WILL BRING ORDER AND PREDICTABILITY TO TITLE VII JURISPRUDENCE.

The case before the Court presents the Justices with the opportunity of integrating the *quid pro quo* and hostile workplace standards of liability in cases where a supervisor is the source of the harassment. A rule applying strict liability to employers in all cases in which the harasser acts in a supervisory capacity by holding the authority to alter the terms and conditions of the employee's workplace, whether for *quid pro quo* demands or generalized inappropriate sexual behavior, would do much to "bring order to the chaotic case law"[15] in this area. *Amicus* submits that such a rule of liability would also further compliance with employers' obligations under Title VII to "take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under Title VII, and developing methods to sensitize all concerned."[16]

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[15] *Ellerth v. Burlington Industries, Inc.*, 123 F.3d 490, 494-95 (1997).

[16] Equal Employment Opportunity Commission, "Guidelines on Discrimination Because of Sex," 29 C.F.R. Sec. 1604.11(f).

IV. CONCLUSION

For the reasons discussed herein, *amicus curiae* The Rutherford Institute respectfully suggests that the judgment of the Eighth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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[17] The Rutherford Institute wishes to thank the following law students for their invaluable assistance in researching and preparing this *amicus* brief:

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The work performed by Ms. Steamer and Ms. Anton is a credit to both themselves and their law school.

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RESPONDENT.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF *AMICI CURIAE* OF EQUAL RIGHTS ADVOCATES, NOW LEGAL DEFENSE AND EDUCATION FUND, NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES and NATIONAL WOMEN'S LAW CENTER ON BEHALF OF RESPONDENT

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No. 97-569

In the Supreme Court of the United States
October Term, 1997

BURLINGTON INDUSTRIES, INC.,
PETITIONER,
v.
KIMBERLY B. ELLERTH,
RESPONDENT.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF *AMICI CURIAE* OF EQUAL RIGHTS ADVOCATES, NOW LEGAL DEFENSE AND EDUCATION FUND, NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES, and NATIONAL WOMEN'S LAW CENTER ON BEHALF OF RESPONDENT

INTEREST OF THE *AMICI CURIAE*

Amici curiae are organizations strongly committed to achieving equality for women. Each has an abiding interest in sound interpretations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, which protects against sexual harassment in the workplace. Descriptions of the individual organizations are set forth in the appendix.[1]

[1] The parties' written consent to the filing of this brief has been filed with the Court. No counsel for any party authored

SUMMARY OF THE ARGUMENT

This case raises the question whether *quid pro quo* sexual harassment occurs where an adverse employment action is threatened but never carried out. In Part I, *amici* urge the Court to hold that such threats constitute *quid quo pro* harassment. Also implicit in the question presented, and made explicit in petitioner's brief (Pet.Br. 15), is the premise that it is significant to the employer's liability whether the label *quid pro quo* is attached to the conduct. This premise is unfounded. We argue in Part II that, whether harassment is characterized as *quid pro quo* or not, an employer ordinarily is vicariously liable when the perpetrator is a supervisor. The distinction petitioner draws between different types of harassment has no basis in Title VII, in the law of agency, or in the realities of the workplace. We conclude in Part III by showing that petitioner's claim of a likely flood of litigation if employers are held liable for supervisory harassment is baseless.

ARGUMENT

The court of appeals correctly held that petitioner may be held liable for sexual harassment committed by one of its supervisors. This conclusion is supported by two distinct points. First, threats made by a supervisor that link tangible job benefits to an employee's compliance with sexual demands constitute *quid pro quo* harassment, even if the threats are not carried out. Second, petitioner's effort to

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this brief in whole or in part, and no person or entity other than the *amici curiae* and their counsel made any monetary contribution to the preparation or submission of this brief.

draw a sharp distinction between *quid pro quo* and hostile environment harassment for purposes of employer liability is without basis in Title VII or agency law. Regardless of how the harassment is characterized, the employer will ordinarily be liable under agency principles[2] when the perpetrator is vested with supervisory authority.

I. *Quid Pro Quo* Sexual Harassment Occurs Even if the Supervisor Never Carries Out the Threatened Adverse Job Actions

Quid pro quo sexual harassment occurs when a supervisor threatens to link an employment benefit to an employee's agreement to engage in sexual relations. It is not necessary that the supervisor carry out his threat; the threat itself alters the terms and conditions of the target's employment, in violation of Title VII.

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[2] *See Meritor Savings Bank v. Vinson*, 477 U.S. 57, 72 (1986) (employer liability for sexual harassment based on agency principles). This Court in *Meritor* did not issue a detailed set of rules for application of agency principles. Now, more than a decade later, development of the law has been marked by confusion and routine departures from sound agency principles. *See* David B. Oppenheimer, *Exacerbating the Exasperating: Title VII Liability of Employers for Sexual Harassment Committed By Their Supervisors*, 81 Cornell L. Rev. 66, 131 (1995) (arguing that the lower courts "have split on the proper test to apply to . . . harassment by a supervisor," and that their rulings "are difficult to reconcile with the law of agency"). This case presents the opportunity to reaffirm the central role of the law of agency, and to supply the clarity that has been missing since *Meritor*.

The essence of a *quid pro quo* violation is the threat itself, and the link it creates between sex and an employee's work life. Proof of economic injury is not the only way to demonstrate that job benefits are being conditioned on acquiescence to sexual overtures. The plaintiff can demonstrate that: (1) economic injury is threatened; (2) economic injury was avoided by the plaintiff's acquiescence to sexual overtures; *or* (3) non-monetary terms and conditions of employment, such as hours or work assignments, were threatened or actually affected by the *quid pro quo* harassment. *See Karibian v. Columbia University*, 14 F.3d 773, 779 (2d Cir.) (concluding, "once an employer conditions any term of employment upon the employee's submitting to unwelcome sexual advances, a *quid pro quo* claim is made out"), *cert. denied*, 512 U.S. 1213 (1994); *Robinson v. City of Pittsburgh*, 120 F.3d 1286 (3d Cir. 1997); *Nichols v. Frank*, 42 F.3d 503, 511 (9th Cir. 1994). There is no basis in the statutory language or underlying purposes of Title VII to make employer liability turn on what happens after the threat has been made.

A supervisor's threat may not be carried out due to the employee's acquiescence or for other, unrelated reasons. In either event, the employer is liable for *quid pro quo* sexual harassment. Where an employee has acceded to the coercive sexual demands, the terms and conditions of her employment have been fundamentally altered. Unlike other employees, whose promotions, raises or continued employment are dependent on legitimate factors like their performance or the company's business fortunes, the victim's job status depends, in whole or in part, on her sex.

The opposite conclusion would, in effect, "punish the victims of sexual harassment who surrender to unwelcome sexual encounters." *Karibian*, 14 F.3d at 778. This would produce the perverse outcome of "encourag[ing] harassers to increase their persistence," *id.*, and put them in a better position than if the acquiescence had not occurred. It would distinguish between harassers on a basis that has nothing to do with their own adherence to Title VII, but instead on the success of their transgression.[3]

In a closely related context, extortion and blackmail are no less crimes when the victim submits to the threats and receives the "benefit" promised. *See, e.g., State v. O'Flynn*, 496 A.2d 348 (N.H. 1985) (conditioning job promotions on receipt of campaign contributions is extortion); *Commonwealth v. Tiberi*, 361 A.2d 318 (Pa.Super. 1976) (hinging promotion on employee's payment of money is extortion). As with *quid pro quo* sexual harassment, the threat is the unlawful conduct in these cases. The ultimate success of the enterprise is irrelevant to liability.

Nor is there any greater warrant for excusing sexually coercive threats where the employee does not acquiesce but

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[3] Ordinarily, if the law distinguishes between successful and failed violations of the law, it punishes the attempt less harshly. *See, e.g.*, Ky. Rev. St. § 506.010(4) (punishment for criminal attempt is equivalent to one grade lower than for the completed offense for most felonies). It would thus be ironic to relieve employers of liability because a harasser's sexual demands are met, and punish only "unsuccessful" *quid pro quo* threats, as petitioner's standard would do.

the threats are not carried for other reasons. Of course, if the threat is not carried out, the threatened adverse job consequences are not visited on the plaintiff. What remains, however, is the psychological injury inflicted on the victim. *See* CATHARINE MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 47 (1979) ("Like women who are raped, sexually harassed women feel humiliated, degraded, ashamed, embarrassed, and cheap, as well as angry. When asked whether the experience had any emotional or physical effect, 78 percent of the Working Women United Institute sample answered affirmatively.").[4]

This Court recognized in *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 22 (1993), that emotional distress, including but not limited to severe psychological injury, is unquestionably one aspect of the harm that sexual harassment produces. While such injury is not a necessary condition of liability for hostile environment harassment, Title VII has, since 1991, provided a concrete remedy for it. 42 U.S.C. §1981(a)(1) (1988 & Supp. V); *see, e.g., Smith v. Northwest Financial Acceptance, Inc.*, 129 F.3d 1408 (10th Cir. 1997) (affirming award of compensatory damages for emotional distress). In

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[4] *See also* J.L. Vinciguerra, *The Present State of Sexual Harassment Law: Perpetuating Post Traumatic Stress Disorder in Sexually Harassed Women*, 42 Clev. St. L. Rev. 301, 315 (1994) (over 90% of sexually harassed women suffer some debilitating stress reaction, including anxiety, depression, headaches, sleep disorders, gastrointestinal disorders, weight gain or loss, nausea, lowered self-esteem, and sexual dysfunction); L.F. Fitzgerald, *Violence Against Women in the Workplace*, Am. Psychologist at 1072 (Oct. 1993).

fact, the damages provision of the Civil Rights Act of 1991 was included in large part because Congress recognized that Title VII had not previously provided adequate compensation for the harm suffered by victims of discrimination, and of sexual harassment in particular. Civil Rights Act of 1991, Pub.L. No. 102-166, § 3(1), 105 Stat. 1071, 1071 (1991) (listing among statute's purposes "to provide appropriate remedies for intentional discrimination and unlawful harassment in the workplace"); H.R. Rep. No. 40, 102nd Cong., 1st Sess.; pt. 2, at 1 (1991), reprinted in 1991 U.S.C.C.A.N. 694, 694 (Act was intended "to provide more effective deterrence and adequate compensation for victims of discrimination"); *id.* at 25, 1991 U.S.C.C.A.N. at 718 (discussing problem of inadequate compensation for victims of discrimination, focusing primarily on "the severe consequences of the lack of a damages remedy in Title VII for claimants who suffered severe harassment on the job").

Thus, even where specific threats are not carried out, the threat itself may produce a substantial part of the harm against which Title VII protects. This Court should reaffirm that *quid pro quo* harassment is "sexual misconduct [that] is directly linked to the grant or denial of an economic *quid pro quo*," *Meritor*, 477 U.S. at 65, and make clear that the link comes into being when the supervisor makes the threat.

II. Regardless of the Form Sexual Harassment Takes, An Employer Should Be Held Vicariously Liable When it is Committed By a Supervisor

While *amici* urge this Court to affirm the court of appeals' conclusion that respondent alleged *quid pro quo* sexual

harassment, the test for employer liability for sexual harassment committed by a supervisor should be the same whether it is of the *quid pro quo* or hostile environment variety. The line should be drawn based on who commits the harassment (supervisor or co-worker), rather than by the form it takes (*quid pro quo* or hostile environment). Petitioner's contrary argument lacks a foundation in Title VII, and has no place given the realities of the workplace and Title VII litigation. Finally, a proper application of agency principles demonstrates the fallacy of the line drawn by the petitioner.

A. For Purposes of Employer Liability for Supervisory Sexual Harassment, A Distinction Should Not Be Drawn Between *Quid Pro Quo* and Hostile Environment Sexual Harassment

Title VII forbids discrimination in employment on the basis of an individual's "race, color, religion, sex, or national origin," 42 U.S.C. § 2000e-2(a), if it affects an employee's "compensation, terms, conditions, or privileges of employment." 42 U.S.C. § 2000e-2(a)(1); *Oncale v. Sundowner Offshore Services, Inc.*, 66 U.S.L.W. 4172, 4172 (1998). Nothing in the language of Title VII suggests that liability turns on the form sexual harassment takes.

Both *quid pro quo* and hostile environment sexual harassment affect the terms and conditions of employment. *Quid pro quo* does so because, by definition, employment perquisites are conditioned on the performance of sexual services. *See Henson v. Dundee*, 682 F. 2d 897, 908 (11th Cir 1982) ("An employer may not require sexual consideration from an employee as a *quid pro quo* for job benefits."). The same is true of hostile environment claims, albeit in a

different way. The conduct must be so "severe or pervasive" as "to alter the conditions of the victim's employment and create an abusive working environment." *Meritor*, 477 U.S. at 67; *see also Harris*, 510 U.S. at 21.

Courts have not made distinctions in determining liability for any type of discrimination other than sexual harassment. The rule petitioner suggests would create a unique, more limited rule for hostile environment sexual harassment. This would contravene Congress' intent to deter all discriminatory conduct and compensate all victims, and send the unfortunate message that hostile environment harassment is somehow a less serious form of discrimination, not due the same employer attention and responsibility as other violations of Title VII. *See Harris*, 510 U.S. at 25 (Ginsburg, J., concurring) ("Title VII declares discriminatory practices based on race, gender, religion, or national origin equally unlawful."). It would also contradict Congress' finding that "discrimination against women is no less serious than other prohibited forms of discrimination." S.Rep. No. 92-415, 92nd Cong., 1st Sess. 7 (1971).

Deterring discrimination and compensating victims are equally crucial whether the harasser conditions advancement on acquiescence to sexual demands or engages in severe or pervasive harassing conduct that subjects the victim to abusive terms and conditions of employment. As this Court reiterated earlier this Term, Title VII "not only covers 'terms' and 'conditions' in the narrow contractual sense, but 'evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment,'" *Oncale*, 66 U.S.L.W. at 4172 (*citing Meritor*, 477 U.S. at

64).

Title VII demands that employers be held liable for the discriminatory acts of their supervisory personnel who are delegated the power to make employment decisions. It was Congress' judgment that employers, not the victims of discrimination, should bear the cost of remedying and eradicating employment discrimination. *Horn v. Duke Homes, Div. of Windsor Mobile Homes*, 755 F.2d 599, 606 (7th Cir. 1985). In every Title VII context except sexual harassment, courts consistently have applied this rule, rendering the departures from it by some courts in the harassment context all the more striking. For example, in racial and religious discrimination cases under Title VII, courts have held employers liable regardless of whether there was notice or fault. *See, e.g., Young v. Southwestern Sav. & Loan Ass'n.*, 509 F.2d 140, 144 n.7 (5th Cir. 1975) (religious discrimination); *Calcote v. Texas Educ. Found.*, 578 F.2d 95, 98 (5th Cir. 1978) (racial discrimination); *Flowers v. Crouch-Walker Corp.* 552 F.2d 1277, 1282 (7th Cir. 1977) (employer liable for supervisor's racial discrimination, even though it was contrary to company policy and it had not authorized supervisors to discriminate). Ironically, courts have relied on *Meritor* to hold employers liable for discrimination other than harassment when it is committed by supervisors. *See Levendos v. Stern Entertainment, Inc.*, 909 F.2d 747, 751-52 (3d Cir. 1990) (invoking *Meritor* to hold employer liable for gender discrimination by supervisor leading to constructive discharge); *North v. Madison Area Ass'n for Retarded Citizens*, 844 F.2d 401, 407 (7th Cir. 1988) (*Meritor's* use of agency principles applied to wrongful discharge claim).

Moreover, more than two decades of sexual harassment litigation under Title VII have shown that the line between *quid pro quo* and hostile environment harassment -- which petitioner seeks to portray as bright -- hardly exists. Sexual harassment cases do not sort themselves into neat categories. In many situations, the supervisor's conduct contains elements of both *quid pro quo* and hostile environment harassment. In fact, it is extremely rare for a supervisor's actions to be all one type or the other. *E.g., Carrero v. New York City Hous. Auth.*, 890 F.2d 569, 579 (2d Cir. 1989) ("The discrimination which gives rise to them is not neatly compartmentalized but . . . the two types of claims may be complementary to one another."); *Henson*, 682 F.2d at 908 n.18 ("On a practical level, of course, there are many cases that could be characterized interchangeably as condition of work or *quid pro quo* cases."). As Judge Wood said in the opinion below:

> In the real world, sexual harassment does not sort itself into tidy categories. . . . When [a] supervisor bombards an unwilling subordinate with unwanted sexual images, touching, vulgar words, or denigrating comments, only the most committed formalist would feel confident in saying when those actions cross the imaginary line from 'hostile environment' to '*quid pro quo*' harassment.

Pet.App. 177a (Wood, J., concurring and dissenting); *see generally* Susan Estrich, *Sex at Work*, 43 Stan. L. Rev. 813, 834 (1991) (distinction between *quid pro quo* and hostile environment harassment is more like a continuum than a

divide).[5]

Because of the factual idiosyncracies of individual cases, it is more manageable for district courts to decide whether the harassment occurred in the first place and who committed it than to parse a supervisor's every act to determine the category into which it falls. For this reason, employer liability should not turn on the often illusory distinction between *quid pro quo* and hostile environment harassment.

This case illustrates this reality. The court of appeals' judges had sharply divided opinions as to whether the conduct Ellerth suffered was *quid pro quo* or hostile work environment sexual harassment. *Compare* Pet.App. 26a (Flaum, J.)(*quid pro quo*), and *id.* at 205a-206a (Wood, J.)(*quid pro quo*), *with id.* at 57a (Posner, J.) ("purely a hostile-environment case"), and *id.* at 102a (Coffey, J.)(hostile work environment), and *id.* at 151a (Easterbrook, J.)(hostile work environment). The bottom line is that Ellerth was discriminated against "because of" her sex, by conduct that altered the conditions of her employment. Regardless of how the conduct is categorized, petitioner

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[5] The EEOC also has recognized that the line between the two forms of harassment is often hard to discern. The EEOC has observed that "'hostile environment' harassment may acquire characteristics of '*quid pro quo*' harassment if the offending supervisor abuses his authority over employment decisions to force the victim to endure or participate in the sexual conduct." EEOC Policy Guidance on Sexual Harassment, 8 F.E.P. Manual (BNA) 405: 6681 (March 19, 1990).

should be held liable if Ellerth prevails at trial.[6]

As a practical matter, it would severely compromise a plaintiff's ability to prove her claim to hold that employer liability should turn on an artificial distinction between different types of harassment. Before deciding who may be liable, a court first must determine whether sexual harassment occurred. To establish liability, plaintiffs must meet an extremely high burden. As this Court made clear this Term, courts have sought to avoid the transformation of Title VII into a general civility code for the American workplace by imposing a high threshold of proof upon plaintiffs. *Oncale*, 66 U.S.L.W. at 4173. A plaintiff must establish: (1) that the conduct at issue constituted "discrimination . . . because of . .. sex," (2) that the behavior was so objectively offensive as to alter the "conditions" of the victim's employment, and (3) that the behavior be considered in the context in which it occurred and the target experienced it. *Id.* Because of these requirements, only a

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[6] A distinction between forms of sexual harassment should also not be required because pleading rules do not require it. A complaint is not required to state the plaintiff's specific legal theory. *See* Fed.R.Civ.P. 8(a) (complaint need contain only "a short and plain statement of the claim showing that the pleader is entitled to relief"). For sexual harassment claims, a plaintiff need only plead a violation of Title VII based on the harassment; she need not specify whether it was of the *quid pro quo* or hostile environment variety. *See Rohler v. TRW, Inc.*, 576 F.2d 1260, 1264 (7th Cir. 1978). If a plaintiff need not plead the specific form of harassment that took place, it follows that liability should not turn on the distinction.

few of the small number of victims who actually file suit prevail. D.E. Terpstra & D.D. Baker, *Outcomes of Federal Court Decisions on Sexual Harassment*, 35 Acad. of Mgmt. J., Vol. 1, at 185 (1992); U.S. Merit Systems Protection Board, *Sexual Harassment in the Federal Workplace* , at viii (1995) (only 6% of those harassed take official action).

Once supervisory harassment is established, litigating separately whether the employer should be held liable imposes an undue burden on plaintiff. A victim should not be required to distinguish between the types of harassment and, in a hostile environment situation, decide to complain and to whom. In light of the difficulty courts have had assigning the labels "*quid pro quo*" and "hostile environment," it is unrealistic to expect a victim to know the precise legal cubbyholes into which her allegations fall.[7]

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[7] Most harassed employees do not even complain. Fifty percent (50%) of women respond to harassment by doing and saying nothing. F. Klein & M. Rowe, *Estimating the Cost of Sexual Harassment to the Fortune 500 Service and Manufacturing Firms*, Testimony on H.R. 1, before the House of Representatives Committee on Education & Labor, 102nd Cong., 1st Sess. 169, 209 (1991). Only 10% to 15% of women, a review of ten studies revealed, either responded assertively to or reported their harasser. J.E. Gruber & M.D. Smith, *Women's Responses to Sexual Harassment: A Multivariate Analysis*, Basic & Applied Social Psychology, at 544-545 (1995). The barriers keeping women from complaining about harassment are especially daunting when a supervisor is the source. "Real victims rarely tell the harasser to stop. They are often inhibited or constrained from doing so by the situation (e.g., *their supervisor is the harasser*), or by their upbringing." B.A. Gutek, *Responses to Sexual Harassment in* Gender Issues in Contemporary Society, at 197, 205 (1993) (emphasis added). If company policy requires a victim to go to her supervisor first, she may feel she has little recourse and will receive little support. Promises of confidentiality or anonymity are impossible for employers to keep. The accused ultimately will be informed of the accusation and given a chance to present his story, even confront the accuser. Victims understand that the implications for their employment are gravest when a person with power in the organization is involved.

B. A Distinction Between *Quid Pro Quo* and Hostile Environment Sexual Harassment Has No Basis in the Law of Agency

Just as Title VII does not, on paper or in practice, divide sexual harassment into neat categories, neither does agency law. To the contrary, agency law emphasizes an agent's authority in defining the circumstances in which a principal is liable for an agent's actions. Because the use of delegated authority by a supervisor is common to both *quid pro quo* and hostile environment harassment, agency principles hold the employer liable on the same basis for each. In this section, *amici* will first examine the relationship between supervisory authority and sexual harassment in the workplace. We will then discuss the treatment of that relationship by the law of agency.

1. Sexual harassment of women by their supervisors is an exercise of power in the workplace. It represents an extension of a supervisor's control over the terms and

conditions of a subordinate's work:

> [F]rom the employee's point of view, the supervisor's ability to harass her is created precisely by the agency relationship, which affords the supervisor the authority to call her into his presence, to retain her in his presence over her objections, to use his responsibility to act as the voice of the employer to place her in a compromising position, and to take liberties with her personal privacy beyond the reach of a co-equal acquaintance, or a stranger.

Oppenheimer, 81 Cornell L. Rev. at 88.

It is difficult to imagine a scenario in which the supervisor's authority in the workplace will be of no relevance to the employee's perception of the harassment, or in which the supervisor will not in some fashion be capitalizing on his authority when he harasses subordinates. *See Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437, 1446 (10th Cir. 1997) (because supervisor abused his delegated authority to create hostile work environment, employer is liable despite having no notice), *petition for cert. filed*, No. 97-232 (Aug. 6, 1997); *Torres v. Pisano*, 116 F.3d 625, 635 (2d Cir. 1997) (supervisor's use of authority to facilitate harassment may be implicit, including acts creating the opportunity), *cert. denied*, 118 S. Ct. 563 (1997). Petitioner is thus simply wrong to suggest, Pet.Br. 22, that a supervisor "has not actually used any authority delegated by the employer" when he makes *quid pro quo*-style threats.

The connection between a supervisor's authority and sexual harassment is underscored by data showing that a

significant portion of harassment occurs between a supervisor and supervisee. One study of Fortune 500 companies found that almost two-thirds of harassment complaints are brought against either a woman's immediate supervisor (36%) or another person with greater power (26%). R. Sandroff, *Sexual Harassment in the Fortune 500*, Working Woman, at 69, 71 (Dec. 1988). Other studies have shown that half of all harassers are the direct supervisors of the target. B.A. GUTEK, SEX AND THE WORKPLACE: IMPACT OF SEXUAL BEHAVIOR AND HARASSMENT ON WOMEN, MEN AND ORGANIZATIONS (Jossey-Bass, Inc. 1985); B.A. Gutek, C.Y. Nakamura, M. Gahart, et al., *Sexuality in the Workplace*, Basic and Applied Social Psychology, at 255-65 (1983). Supervisors are also more likely to subject employees to the more severe forms of harassment. J.N. Cleveland & M.E. Karst, *Sexual Harassment and Perceptions of Power: An Under-Articulated Relationship*, J. of Vocat. Behav. 42, at 54 (1993).

Both *quid pro quo* and hostile environment sexual harassment derive from the supervisor's abuse of authority. There is no reason to distinguish between abuse of authority to hire, fire and discipline employees (the classic *"quid pro quo"*) and abuse of authority to supervise the work environment and ensure a safe, productive workplace (the classic "hostile environment"). In both cases, it is the authority vested in the supervisor by the employer that enables him to commit the wrong. Individuals in higher-status positions within an organization believe and are believed to have the right to make demands of those in lower

status roles.[8] Some high-status individuals view harassing behavior as an extension of that right. Lower-status individuals are expected to comply. *See* J.N. Cleveland & M.E. Karst, at 54.

Not only do supervisors have, by definition, greater authority and power than do their targets, but they also influence the norms of the workplace. Typically, supervisors evaluate the performance of their subordinates, determine assignments and, often, decide on whether an individual retains his or her job. They also influence the "climate" of work: what behaviors are acceptable, what performance standards exist, and how communication occurs. *Id.*[9] As a

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[8] The authority wielded by a supervisor can be apparent, based on the belief of third parties (particularly subordinates) that the supervisor has the authority to act. Restatement (Second) of Agency § 8 cmt. a, § 7 cmt. b. (1957). In some circumstances, an employer ratifies such authority simply by retaining the supervisor in his position. *Id.* § 8 cmt. b. Abuses of apparent authority are attributable to the employer. *Meritor*, 477 U.S. at 77 (Marshall, J., concurring) ("[I]t is precisely because the supervisor is understood to be clothed with the employer's authority that he is able to impose unwelcome sexual conduct on subordinates.").

[9] *See Meritor*, 477 U.S. at 76 (Marshall, J., concurring) ("A supervisor's responsibilities do not begin and end with the ability to hire, fire, and discipline employees, or with the power to recommend such actions. Rather, a supervisor is charged with the day-to-day supervision of the work environment and with ensuring a safe, productive workplace."). The lower courts have correctly held that it is not necessary that an official possess "ultimate authority to hire or fire" to be classified as a supervisor. *See Paroline v. Unisys Corp.*, 879 F.2d 100, 104 (4th Cir. 1989), *vacated in part on other grounds*, 900 F.2d 27 (4th Cir. 1990); *see also Reinhold v. Commonwealth of Virginia*, ___ F.3d ___, 1998 WL 45247 at *15 (4th Cir. Feb. 6, 1998); *Sauers v. Salt Lake County*, 1 F.3d 1122, 1125 (10th Cir. 1993); *Kauffman v. Allied Signal, Inc.*, 970 F.2d 178, 186 (6th Cir.), *cert. denied*, 113 S. Ct. 831 (1992); *Lai v. Prudential Ins. Co.*, 1998 Cal.App. LEXIS 211 (March 17, 1998).

result, a victim of supervisory harassment is more likely to submit and less likely to complain than in cases of co-worker harassment.

Ellerth's experience is typical of women harassed by their supervisors. Slowik, Ellerth's supervisor's supervisor, had ultimate authority over her assignments and promotions. (J.A. 121-22, 144, 160). Slowik used his position to traumatize Ellerth over a long period of time. Between 1993 and 1994, Slowik subjected Ellerth to a barrage of sexual comments, lecherous looks, and repeated touchings. (J.A. 130-33, 136-43, 153-60). Although Ellerth complained to Slowik (J.A. 148), her co-workers (J.A. 133, 148) and, eventually, other supervisors (J.A 15-16), she obtained no relief. Ultimately, she was forced to resign rather than continue to endure the conduct. *Id.* Because Slowik's supervisory authority over Ellerth enabled him to harass her and get away with it, it makes no difference how his conduct is characterized. Petitioner should be held liable.

2. In light of the inherent connection between supervisory authority and sexual harassment, employers are liable under agency principles, which hold employers vicariously liable

for wrongs committed by agents under two circumstances relevant to this case. First, a supervisor's harassing conduct falls within the scope of his employment, bringing into play Section 219(1) of the Restatement (Second) of Agency, under which an employer is liable for torts committed "within the scope of employment" of an agent. While employers rarely if ever authorize their supervisors to commit sexual harassment, and may even expressly forbid such acts, that does not render the conduct outside the scope of the agency. The authority that must exist to hold the employer liable for the wrongs of an employee need not be the authority to commit the wrong itself. If that were the test, vicarious employer liability for employees' torts would be rare indeed.[10] An act may be "forbidden, or done in a forbidden manner," Restatement (Second) of Agency § 230, and it may even be "consciously criminal or tortious," *id.* § 231, yet still be within the scope of employment.

The Alaska Supreme Court's ruling in *Doe v. Samaritan Counseling Center*, 791 P.2d 344, 348 (Ak. 1990), illustrates this principle. There, the defendant counseling center was held liable for the acts of an employee who engaged in a

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[10] If employers authorize or negligently respond to wrongful acts, there is no need for vicarious liability; they are directly liable for their own intent or negligence. Under petitioner's view of "scope of employment," vicarious liability would exist only when the employer was already liable, rendering the concept entirely duplicative and a virtual dead letter. *See* 29 C.F.R. § 1604.11(b) (EEOC 1980 Guidelines recognizing irrelevance of fault where employer is vicariously liable).

sexual relationship with a patient which was clearly not within his job description. Nevertheless, under the scope of employment doctrine, the employer was liable because "the tortious conduct ar[ose] out of and [was] reasonably incidental to the employee's legitimate work environment."[11] In short, the proper question to ask is whether the employer placed the supervisor in a position to commit the act in the course of performing his regular responsibilities.[12] As the Restatement of Agency points out:

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[11] *See also Simmons v. United States*, 805 F.2d 1363 (9th Cir. 1986) (government liable for unauthorized acts of counselor who engaged in sexual relationship with patient in conjunction with acts within scope of duties); *Agarwal v. Johnson*, 603 P.2d 58 (Cal. 1979) (employer liable for willful torts of its supervisors, including intentional infliction of emotional distress and defamation, committed in scope of employment); *Turner v. State*, 494 So.2d 1292 (La.Ct.App. 1986) (state liable for sexual batteries, trespass, and invasion of privacy by national guard recruiting officer against female recruits).

[12] *Doe* illustrates the fallacy in Professor Verkerke's distinction (relied upon by petitioner, Pet.Br. 23 n.16) between *quid pro quo* harassment and so-called "attempted" *quid pro quo* harassment, on the ground that the former involves "unconcealed" acts "about which the employer can learn even more easily than victims." J. Hoult Verkerke, *Notice Liability in Employment Discrimination Law*, 81 Va. L. Rev. 273, 367 (1995). An agent's torts are often "concealed" for the very reason that they constitute abuses of delegated authority. An employer is nevertheless liable for them. By stressing "concealment" rather than the authority of the agent, this argument departs from *Meritor's* directive to apply agency law.

> [t]he fact that the predominant motive of the servant is to benefit himself or a third person does not prevent the act from being within the scope of employment. If the purpose of serving the master's business actuates the servant to any appreciable extent, the master is subject to liability . . . .

Restatement (Second) of Agency § 236 cmt. b.

Petitioner's liability for the conduct of its supervisors is also proper under Section 219(2)(d) of the Restatement (Second) of Agency, which provides that an employer is liable for the acts of an employee when he "was aided in accomplishing the tort by the existence of the agency relation." A supervisor's authority may enable him to assign work, require attendance at particular sites and times, and influence whether and under what conditions the employee works. When subordinate employees are sexually harassed, such authority almost always facilitates its occurrence and success. *See* EEOC Policy Guidance on Sexual Harassment, 8 F.E.P. Manual at 405:6699 (citing § 219(2)(d)).

Application of these agency law doctrines should not vary with the type of harassment involved. As Justice Marshall noted in his concurring opinion in *Meritor*, there is no justification for having different standards of employer liability, at least when the harasser is a supervisor. *Meritor*, 477 U.S. at 77 ("No such requirement appears in the statute, and no such requirement can coherently be drawn from the law of agency.") (Marshall, J., concurring). As Judge Flaum noted in his opinion below, employer liability stems from the delegation of authority to a supervisor, which can be used as

"leverage over a supervisee that does not vary with the nature of the harassment." Pet.App. 13a n.4. The EEOC's 1980 Guidelines made much the same point, stating: "an employer . . . is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment," without distinguishing between different types of harassment. 29 C.F.R. § 1604.11(c) (1995).[13]

Agency law holds employers liable for the acts of agents to serve the twin purposes of compensation and deterrence, both of which are of paramount importance under Title VII. As Judge Swygert explained over a decade ago, "sex discrimination can best be eradicated by enforcing a strict liability rule that ensures compensation for victims and creates an incentive for the employer to take the strongest possible affirmative measures to prevent the hiring and

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[13] The standard we have outlined here is consistent with *Meritor*. Consistent with the Court's observation, 477 U.S. at 72, that Congress intended "to place some limits on the acts of employees for which employers under Title VII are to be held responsible," we urge that co-worker harassment should not give rise to strict liability. Nor does our test contravene the Court's holding that the court of appeals in *Meritor* "erred in concluding that employers are automatically liable for sexual harassment by their supervisors." *Id.* Employer liability is not automatic. Imposition of vicarious liability depends on the link between the harassment and the supervisor's authority. Although the link will almost always exist, the employer can show in a particular case that authority played no role in producing, motivating or facilitating the harassment.

retention of sexist supervisors." *Horn*, 755 F.2d at 605.[14]

A rule of vicarious liability encourages an employer, as no other regime does, to exercise the greatest care in screening prospective managers, and in training, supervising, and monitoring existing supervisors. As Judge Posner has explained: "[t]he most efficient method of discouraging sexual harassment may be creating incentives for the employer to police the conduct of its supervisory employees, and this is done by making the employer liable." Richard A. Posner, *An Economic Analysis of Sex Discrimination Laws*, 56 U. Chi. L. Rev. 1311, 1332 (1989).[15]

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[14] Employer liability is further justified because virtually every court of appeals has held that individual agents cannot be held liable for their violations of Title VII. The lower courts have read § 701(b) of the statute -- which defines "employer" to include "a person engaged in an industry affecting commerce . . . and any agent of such a person," 42 U.S.C. § 2000e(b) -- not to hold the agent liable as a statutory "employer," but instead "to incorporate respondeat superior liability into the statute." *Miller v. Maxwell's International, Inc.*, 991 F.2d 583, 587 (9th Cir. 1993), *cert. denied*, 510 U.S. 1109 (1994); *see also Gary v. Long*, 59 F.3d 1391, 1398-99 (D.C. Cir. 1995) (despite alleging facts sufficient to constitute a pervasive hostile environment, plaintiff left with no remedy, where employer was not liable because of "adequate" sexual harassment policy and harasser was held not to be covered employer). This Court has not reached the question whether an individual responsible for discrimination may be held liable as an "agent," and hence as an "employer," under the language of § 701(b).

[15] In his opinion below, Judge Posner limited this reasoning to instances where the threat is carried out, on the ground that

Unfortunately, some courts have departed from this standard in the area of hostile environment harassment, producing a dizzying array of alternative, and often inconsistent, theories of employer liability for supervisory sexual harassment. *See* Oppenheimer, 81 Cornell L. Rev. at 131. The Second and Tenth Circuits, however, have recently set forth helpful applications of agency principles. In *Torres*, 116 F.3d at 635, the Second Circuit noted that "to establish liability on the theory that the supervisor exploited the

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where the threat is not carried out, the supervisor "has not used his delegated authority to commit a company act, [so] there is no way in which a system for vetting such acts would catch him out". Pet.App. 50a-51a (Posner, J., concurring in part and dissenting in part). Judge Posner was wrong on both counts. In making the threat, the supervisor has used authority the employer vested in him. Because it affects the conditions under which the victim works thereafter, it constitutes a company act. As for the employer's purported lack of means to deal with unfulfilled threats, Judge Posner ignored the importance of effective pre-threat procedures, as well as proactive monitoring of the workplace. While these steps cannot reduce incidents of *quid pro quo* threats to zero, that is no basis for ignoring the deterrent effect they do have, or to forego vicarious liability as an incentive for employers to use them. Any perceived unfairness in holding employers liable for unfulfilled threats is outweighed by the unfairness of leaving the victims of those threats without a remedy for the harm done to them. The employer who assumes the risks of doing business is better able than the victim to absorb the losses, insure against them, or distribute them. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 471 (3d ed. 1964).

agency relationship in committing the harassment, a plaintiff 'must allege facts which establish a nexus between the supervisory authority' and the harassment." This nexus will exist in most cases of sexual harassment by supervisors. Rarely would a supervisor not be aided in his ability to subject a subordinate employee to harassment by his authority to control crucial aspects of her work environment. The Tenth Circuit recognized this fact of workplace life in *Harrison*, 112 F.3d at 1445-46, holding that the employer is liable because it confers on the supervisor authority over the subordinate employees, which is then abused. In this concrete sense, the agency relationship aids and facilitates the supervisor in perpetrating the harassment.[16]

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[16] The case for applying these agency principles in sexual harassment cases is enhanced by their routine application to other types of discrimination. In typical Title VII hiring, discharge or promotion cases, the acts of supervisors are imputed to the employer, without regard to fault or notice on the employer's part. *See* page 10, *supra*. Petitioner seeks to distinguish such cases on the ground that other forms of discrimination constitute "company acts." Pet.Br. n.14. This claim founders in its assumption that a supervisor who uses the authority vested in him by the company to sexually harass subordinates does not commit a "company act," by which petitioner evidently means an act that causes a "tangible job detriment." *Id.* This Court has rejected the claim that harassment must cause tangible economic loss to constitute discrimination under Title VII. *Harris*, 510 U.S. at 21; *Meritor*, 477 U.S. at 64. As a result, there is no reason to treat one form of discrimination (sexual harassment) differently from all others as not involving a "company act."

The standard articulated in *Harrison* and the 1980 EEOC Guidelines provide the bright line test that can dispel the confusion that has grown since *Meritor*. They condition employer liability not on some hybrid of direct and vicarious liability, but instead on a straightforward application of agency law: employers are liable (1) for the wrongful acts of employees committed within the scope of their employment, or (2) for acts that are facilitated by the agency relationship the employer has created. This Court should reaffirm *Meritor's* adoption of agency principles, and endorse the Guidelines' accurate and unadorned explanation of them.[17]

III. Imposing Liability on Employers For Supervisor Harassment Will Not Produce a Flood of Litigation

Finally, petitioner contends that imposing liability on employers for supervisory harassment will greatly expand the number of harassment lawsuits and decrease those that are resolved at the summary judgment stage. Pet.Br. 25. There is no basis for these assertions.

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[17] If an employer's liability for supervisory harassment does not depend either on the form the harassment takes or on the employer's negligence, it follows that the court of appeals erred in holding that Ellerth waived any reliance on a hostile environment theory by disavowing the argument that "liability should be imposed because of employer negligence." Pet.App. 28a (Flaum, J., concurring). Ellerth did not concede that she had not been subjected to a hostile environment; the court of appeals said only that in order to proceed on that theory she needed to base her argument on petitioner's negligence, which she had expressly declined to do.

As this Court observed in *Oncale*, 66 U.S.L.W. at 4173, the courts have imposed high legal standards and proof requirements to avoid the implication that they are improperly regulating conduct in the workplace. As the numerous cases where egregious facts existed and no liability was found demonstrate, these requirements constitute powerful obstacles for plaintiffs to overcome. *E.g., Gleason v. Mesirow Financial, Inc.*, 118 F.3d 1134, 1144 (7th Cir. 1997) (telling co-workers that customers were "bitchy," "dumb," or suffering from PMS, commenting on size of female employee's breasts, ogling women co-workers, placing ad for nudist colony on plaintiff's desk, and telling plaintiff about erotic dreams he had about her not sufficiently "deeply offensive" to be sex harassment); *Baskerville v. Culligan Int'l Co.*, 50 F. 3d 428, 432 (7th Cir. 1995) (calling plaintiff "pretty girl" repeatedly, making grunting and "um um um" sounds when she wore leather skirt, commenting that office was not hot "until you walked in here," and alluding to his wife's absence from town and his loneliness while making gesture suggesting masturbation; not sufficiently "severe" conduct to be sexual harassment). The standards of proof are sufficiently high to stem any anticipated "flood" of cases.

Moreover, experience belies petitioner's warning of a litigation explosion. Both California and Illinois do not distinguish between the form of harassment in imposing liability on employers. Cal. Gov't Code § 12940 (h) (West 1992 & Supp. 1996); *Lai*, 1998 Cal.App. LEXIS 211; *Green Hills Country Club v. Illinois Human Rights Comm'n*, 162 Ill. App. 3d 216 (5th Dist. 1987) (employers "strictly liable"

in Illinois for both *quid pro quo* and hostile work environment sexual harassment by supervisory personnel). There is no evidence that either state has witnessed an explosion of cases and unlimited employer liability as a result.

In fact, lawsuits could even decrease were vicarious liability imposed for supervisor harassment. Employers would be given an incentive to put sexual harassment policies and training programs in place. 54% of Fortune 500 employers admitted that fears of legal exposure prompted them to establish company policies against sexual harassment. R. Sandroff, *Working Woman*, at 70. Prevention programs, including well-communicated policies and effective training programs, are the best means of reducing sexual harassment in the workplace. *See* J.I. Avner, *Sexual Harassment: Building a Consensus for Change*, Kan. J.L. & Pub. Policy, 57, 74 (Spr. 1994); *Panelists Say Education is Essential to Effective Harassment Prevention Policy*, 66 U.S.L.W. 2271 (Nov. 4, 1997). Companies implementing sexual harassment training programs have reduced the number of claims that develop into lawsuits. *See* Sarah Glazer, *Crackdown on Sexual Harassment*, 6 CQ Researcher 625, 633-34 (July 19, 1996) (of 456 mid-size and large companies, 8% of companies with training programs were sued, as opposed to 12% of those without such programs).

Petitioner's argument (Pet.Br. at 25) that imposing liability on employers for supervisor harassment will reduce the number of cases resolved through summary judgment is

similarly specious.[18] The credibility issues to which petitioner refers (Pet.Br. at 26) go to the elements of the underlying harassment: *e.g.*, whether the conduct was "sufficiently severe or pervasive." By contrast, the issues relating to employer liability (who committed the harassment, and whether he had sufficient authority) depend far less on potentially conflicting testimony. If anything, eliminating the distinction between *quid pro quo* and hostile environment harassment when determining employer liability will increase the number of cases decided as a matter of law.

CONCLUSION

The judgment below should be affirmed. Respectfully submitted,

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[18] The argument is also peculiarly results-oriented. Petitioner assumes that adoption of a legal standard for employer liability should be controlled by asking whether it would produce outcomes petitioner deems desirable early enough in the litigation. This argument has the matter backwards. Whether summary judgment should be granted is determined by the governing legal standard. The legal standard does not depend on whether it allows summary judgment to be granted in some pre-determined ideal percentage of cases.

APPENDIX

Equal Rights Advocates ("ERA") has dedicated itself for the past twenty-four years to achieving equality for women and girls. ERA has represented plaintiffs in numerous sexual harassment cases, including the first case in the Ninth Circuit to find sexual harassment a violation of Title VII of the Civil Rights Act of 1964, *Miller v. Bank of America*, 600 F.2d 211 (9th Cir. 1979). In addition, ERA educates hundreds of women each year through its Advice & Counseling Line regarding their legal right to be free from sexual harassment, conducts sexual harassment workshops for schools and nonprofit organizations, and provides technical assistance to attorneys who are handling sexual harassment claims. ERA has appeared as amicus curiae in numerous California and federal sexual harassment cases including *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986); *Harris v. Forklift Systems, Inc.*, 1994 WL 792661 (M.D. Tenn. 1994); *Faragher v. Boca Raton*, No. 97-282 (S. Ct.); and *Gebser v. Lago Vista*, No. 96-1866 (S. Ct.). In 1996, ERA authored an *amicus* brief in the California case, *Lai v. Prudential Insurance Co.*, 1998 Cal.App. LEXIS 211 (March 17, 1998), which examined the definition of "supervisor" for employer liability purposes under California's anti-discrimination statute.

The *NOW Legal Defense & Education Fund* ("NOW LDEF") is a leading national non-profit civil rights organization that performs a broad range of legal and educational services in support of women's efforts to eliminate sex-based discrimination and secure equal rights. NOW LDEF was founded in 1970 by leaders of the National Organization for Women. A major goal of NOW LDEF is the elimination of barriers that deny women economic opportunities, such as sexual harassment. In furtherance of

that goal, NOW LDEF litigates cases to secure full enforcement of laws prohibiting sexual harassment, including *Faragher v. City of Boca Raton*, No. 97-282 (S. Ct.); *Townsend v. Indiana University*, 995 F.2d 691 (7th Cir. 1993); and *Robinson v. Jacksonville Shipyards, Inc.*, 760 F.2d 1486 (M.D. Fla. 1991). NOW LDEF filed an *amicus* brief in *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993).

The *National Partnership for Women & Families* is a nonprofit, nonpartisan organization that uses public education and advocacy to promote fairness in the workplace, quality health care, and policies that help women and men meet the dual demands of work and family. Founded in 1971 as the Women's Legal Defense Fund, the National Partnership has grown from a small group of volunteers into one of the nation's most powerful and effective advocates for women and families. Working with business, government, unions, nonprofit organizations, and the media, the National Partnership is a voice for fairness, a source for solutions, and a force for change.

The *National Women's Law Center* ("Center") is a non-profit legal advocacy organization dedicated to the advancement and protection of women's rights and the corresponding elimination of sex discrimination from all facets of American life. Since its inception in 1972, the Center has worked continuously to make Title VII's promise of equality in the workplace a reality. The existence of widespread sexual harassment in employment greatly restricts the opportunity for women to participate as full partners in the workplace. The Center has a deep and abiding interest in ensuring that Title VII adequately protects women from sexual harassment in employment.